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INTO THE
SPONSORSHIP PROGRAM
& ADVERTISING ACTIVITIES

RESTORING ACCOUNTABILITY

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VOLUME 2

THE PUBLIC SERVICE AND TRANSPARENCY

Commission of Inquiry
into the
Sponsorship Program
& Advertising Activities

Restoring Accountability

Research Studies
Volume 2

The Public Service
and Transparency

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The Public Service and Transparency

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INTRODUCTION

Donald Savoie

In the fall of 2004, Justice Gomery invited me to join the Commission of Inquiry into the Sponsorship Program and Advertising Activities as its Director of Research for phase II of the Commission's work, or what commonly became known as the recommendation phase. He laid out an important challenge for the research program by asking: "Do you know what makes a good judge?" I did not know the answer, as my puzzled look surely revealed, and he quickly replied: "Two good lawyers in front of the judge representing both sides of the case in a very competent manner." To be sure, the point was not lost on me: Justice Gomery was prepared to consider any issue, so long as the research program was able to provide a solid case for both sides. At no point did Justice Gomery indicate a bias on any question, a preconceived notion or the suggestion that the research program should consider any issue, or look at it from a given perspective. This approach also guided his participation at all the Advisory Committee meetings and at roundtable discussions held in five regions between August and October 2005.

I took careful note of the Commission's mandate and its terms of reference. The terms of reference called on Justice Gomery to make recommendations, "based on the factual findings" from phase I, "to prevent mismanagement of sponsorship programs or advertising activities." It listed a number of specific issues to review and asked for "a report on the respective responsibilities and accountabilities of ministers and public servants."

I monitored the testimony from witnesses who appeared before Justice Gomery, in both the Ottawa and the Montreal sessions. I also produced a paper designed to identify the key issues for the Commission to consider. I met regularly with Justice Gomery to review the issues and the Commission's research program as it was being planned. He asked early on that I take into account what the government was doing to reform its management activities and to review the various documents being tabled by the President of the Treasury Board, so the Commission would not try to reinvent the wheel. He noted, for example, that the Treasury Board had produced a solid document on the governance of Crown corporations. He made the point that, rather than start from scratch, we should offer a critique of the document and compare its findings with developments in this area in other countries.

The Commission's research program was the product of many hands. In particular, I want to single out the work of Ned Franks, Professor Emeritus at Queen's University and one of Canada's leading students of Parliament. He helped with every facet of the research program, from identifying issues to study to recommending scholars and practitioners.

The Commission's Advisory Committee also provided important advice and support to the research program. The Commission was able to attract an impressive list of Canadians to serve on the Committee, led by chairman Raymond Garneau, a leading business person from Quebec, a former Minister of Finance in Quebec and a former Member of

Parliament in Ottawa. Other members included Roch Bolduc, a former Senator and former senior public servant with the Quebec Government; Professor Carolle Simard, from the Department of Political Science and Public Administration at the Université du Québec à Montréal; Bevis Dewar, a former Deputy Minister of Defence and head of the Canadian Centre for Management Development, recently renamed the Canada School of the Public Service; the Honourable John Fraser, a former federal Cabinet minister and former Speaker of the House of Commons; Constance Glube, a former Chief Justice of Nova Scotia; Ted Hodgetts, Professor Emeritus at Queen's University and a member of the Royal Commission on Financial Management and Accountability (Lambert Commission) and editorial director for the Royal Commission on Government Organization (Glassco Commission); and Sheila-Marie Cook, a former official with the federal government and the Commission's Executive Director and Secretary. I acted as Secretary to the Advisory Committee.

I can hardly overstate the importance of the work of the Advisory Committee in designing and overseeing the Commission's research program. I benefited greatly from the wise counsel members provided to me both individually and collectively, from their insights and their necessary words of caution. They were generous with their time and their patience. They read the various research papers and provided advice on how to make use of their findings in shaping the phase II report.

At its most general level, the Commission's research program examined how Parliament relates to the Canadian Government and to public servants, and vice versa; how best to promote transparency in government; and the role of key political and administrative actors in government. The papers produced for the Commission promote various perspectives, and at times conflicting ones. This diversity was by design. The papers also offer different methodologies. We were fortunate in being able to attract leading scholars in their fields to produce these research papers for the Commission. We also turned to practitioners for papers dealing with exempt staff, internal audit, and advertising and sponsorship issues.

The papers deal with all the issues Justice Gomery was asked to address. They look at the respective roles of Parliament, ministers and senior public servants; the appointment process for deputy ministers and the evaluation process for them; access to information; and legislation for whistle-blowing and lobbying.

The Papers

"Defining Boundaries: The Constitutional Argument for Bureaucratic Independence and Its Implication for the Accountability of the Public Service," by Lorne Sossin, states that the constitutional conventions and provisions that influence or make up the form and extent of bureaucratic/political boundaries have accumulated over time. They now give rise to obligations, constraints and responsibilities for decision-making by both public servants and political executives.

Sossin suggests that the largely unwritten conventions and principles, having evolved in the Westminster model, in common law, guidelines and codes, have conferred constitutional status on the public service as an "organ of government." Though public servants have a constitutional status, it is not reflected in legislation, nor is there general acknowledgment that it forms a tangible demonstration of the accountability of the public service. The bureaucratic/political boundaries have value and they are, as Sossin says, "key prerequisites for the success of government and a foundation of Westminster democracy." Another constitutional convention calls for a non-partisan bureaucracy, which means that public servants must execute the policy decisions of politicians; they are appointed and promoted by merit; they are not permitted to engage in partisan politics; they must not publicly express personal views on government policies or administration; they must provide advice confidentially; and they must be loyal to the government of the day.

Sossin reviews several court decisions that have established the terms of the relationship between public servants and the political executive, decisions that specifically address the constitutional conventions of neutrality, rule of law and loyalty. He explains how bureaucratic independence can be maintained through judicial intervention, but, more importantly, through the political will to introduce measures such as guidelines, training and clarification of procedures which will change the culture that currently blurs or misrepresents bureaucratic/political boundaries.

He suggests that a key element of the constitutional convention is what he describes as "the duty on public servants to question, and if necessary to decline to follow instructions which are motivated by partisan interests." At the same time, he cites the Treasury Board's ethical code, which fails to provide explicit instruction to report or act upon observed or experienced improper, illegal or unethical instances. In that and other examples, the constitutional convention is not reinforced by procedural requirements or by an explicit legislative mandate.

Sossin proposes a reorientation of the public service ethos and culture through the adoption of the following measures: a training and education program for public servants, to be established with formal instruction related to dealing with the bureaucratic/political interface; the Privy Council Office (PCO) to be the lead organization charged with providing ministers and political officials with an understanding of the standards and guidelines for their relationship with public servants; and the Public Service Commission to assume responsibility for the standards and compliance requirements for public servants in their relationship with the political executive and the public service.

Sossin proposes the strengthening of the various codes in ways similar to Britain's Civil Service Code. It provides declarative, specific and instructive advice, in contrast to Canada's Privy Council Office, which offers suggestions that public servants "may" or "can" deal with matters of wrongdoing or inappropriate conduct. He recommends that Canada's Code of Values and Ethics for the Public Service be entrenched in legislation. This code, in its revamped version, should reflect the deliberate will of Parliament and give statutory expression to the constitutional convention of a non-partisan public service.

Sossin also recommends the adoption of the Accounting Officer model. Deputy ministers, in the Treasury Board's view, are "answerable to Parliament in that they have a duty to inform and explain," but their ministers are the ones responsible to Parliament. He points out that no constitutional impediments preclude deputy ministers from being directly accountable to Parliament through the committee system. He adds that when deputy ministers are "called before parliamentary committees to account for the conduct of public servants (and their own conduct) they speak to Parliament as the leadership of the public service, a distinct 'organ of government' with a voice independent from their ministers." In these circumstances, deputy ministers are already accountable to Parliament for those matters that are not within the minister's scope of responsibility. Sossin proposes that this independent constitutional duty belonging to deputy ministers be recognized, along with their accountability.

"Encouraging 'Rightdoing' and Discouraging Wrongdoing: A Public Service Charter and Disclosure Legislation," by Ken Kernaghan, recommends that the federal government adopt both a Charter of Public Service Values and disclosure legislation as integral parts of its accountability regime.

The Charter would take the form of a formal written statement outlining the constitutional position of the public service, including its relationship with the political sphere of Government. It would replace the current Public Service Values and Ethics Code. A disclosure of wrongdoing statute would provide protection for public servants who reveal information about such forms of misconduct in Government as illegal activity and gross mismanagement. Kernaghan examines the Charter and disclosure ideas within a comparative context that focuses on Australia, New Zealand and the United Kingdom.

He explains that Australia does not have a Charter, but the APS Values statement and Code of Conduct in its *Public Service Act* are designed to promote a values-based public service. The objective is a change in public service culture which includes a greater relative emphasis on values, rather than rules, and on results, rather than processes. The Public Service Commission has reported steady progress in integrating values into the structures, processes and systems of Australia's federal public service.

New Zealand has a Public Service Code of Conduct emphasizing such core public service values as integrity, honesty, political neutrality, professionalism, obedience to the law, and respect for the institutions of democracy. This Code is complemented by a *Statement of Government Expectations of the State Sector and Commitment by the Government to the State Sector*, which provides a concise statement of values. This document, issued by the ministers, prescribes mutual obligations for both ministers and public servants. Thus, New Zealand comes closer than Australia to articulating the kind of constitutional position of the public service that would be required in a public service Charter for Canada.

Kernaghan reports that, in comparison to Australia and New Zealand, the United Kingdom, in its Civil Service Code, focuses more on democratic values, expresses these values in more elegant language, and is even more concerned than New Zealand with the constitutional role of the public service in its relations with ministers and Parliament. The overall format, language and content of the UK Code provide the best model for a Canadian Charter of Public Service Values.

In all three countries, the main values document contains, or is linked to, disclosure protection for public servants. However, each country's disclosure regime differs significantly from the others.

The Code of Conduct in Australia's *Public Service Act* is followed by a section on "Protection for Whistleblowers." No categories of wrongdoing are provided, and wrongdoing is simply defined as a breach of the Code. With a few exceptions, public servants are "expected" or "encouraged" to make any disclosures within their agency rather than take them to an external authority. The management of disclosures, investigations and the imposition of sanctions are the responsibility of the heads of agencies. This Australian approach has been criticized because it does not cover all public sector employees, protection from reprisal is limited, and the Public Service Commission does not have strong enough investigative and remedial authority.

New Zealand's *Protected Disclosures Act* covers both public and private sector employees and specifies several categories of serious wrongdoing. While employees are "required" to make their disclosures within their own agency, they can, in exceptional circumstances, make them to an "appropriate authority" outside their department. Among the criticisms of the Act are its inconsistent application, the excess of external authorities to whom allegations can be made, and inadequate protection of the identity of those making allegations.

The disclosure provisions in the UK Civil Service Code are an integral part of the government's disclosure regime. The other main mechanism is the *Public Interest Disclosure Act*, which covers not only all public sector employees but private sector employees as well. The UK Civil Service Code deals substantively with the disclosure of wrongdoing. It sets out several categories of wrongdoing and provides a complex system of disclosure procedures for making allegations within or outside one's department. Like Australia and New Zealand, the United Kingdom provides protection against reprisal for public servants who disclose wrongdoing. The provisions for confidentiality in the disclosure process are strongest in New Zealand and weakest in the United Kingdom.

Kernaghan makes a number of recommendations on the basis of his comparative analysis and his examination of the current regime of public service values and disclosure in Canada's federal government. He outlines a disclosure regime that he believes would be more credible and effective than those in Australia, New Zealand and the United Kiingdom. His proposed regime would

- provide disclosure protection in the form of a statute rather than the current policy;
- cover virtually all public sector employees;
- have a Public Service Integrity Office as an independent investigative body accountable to Parliament;
- encourage public servants to exhaust internal remedies but permit them to take allegations directly to the Public Service Integrity Office;
- protect the identity of persons making allegations of wrongdoing to the extent compatible with principles of natural justice; and
- provide for penalties against flagrant and intentional misuse of disclosure mechanisms.

He also recommends the adoption of a Charter of Public Service Values, which would provide a foundation and a framework for good governance by setting the core values of the public service within the broader context of the principles of Canada's parliamentary democracy. He suggests that

- the Charter be positioned as the centrepiece of the federal government's values and ethics regime;

- the Charter include a statement of the core values of public service—as in the current Values and Ethics Code;
- the Charter give pride of place to democratic values such as accountability and neutrality;
- reference be made to the existence of other key documents relating to values and ethics and to relationships between politicians and public servants; and
- the legitimacy of the Charter be enhanced by having it adopted by means of a parliamentary resolution.

Kernaghan concludes that disclosure legislation will promote formal accountability in the sense of prescribing rules of right conduct, and the Charter will foster personal or psychological accountability in the sense of an internalized commitment to do the right thing. Over time, this approach should promote a public service culture that encourages "rightdoing" and discourages wrongdoing.

"Two Challenges in Administration of the *Access to Information Act*," by Alasdair Roberts, states that disclosure laws, such as Canada's access to information legislation, have been promoted as a powerful tool for improving the accountability of public institutions. But disclosure laws are not without problems and issues. He reports, for example, on problems of delay caused by special procedures for "sensitive" requests. He writes that, in Canada, PCO communications staff insisted on reviewing responses to requests relating to the grants and contributions scandal of 2000. Such delays, he points out, reveal that a basic principle of the access to information legislation is widely flawed by federal institutions. Two challenges arise in the enforcement of this Act: adversarialism and erosion of scope.

Roberts reports that the majority of requests made under the legislation are from businesses. The number of journalists who turn to Access to Information legislation is small, and those who report on specific topics smaller still. Still, a significant number of requests come from the opposition parties and the media, particularly on sensitive matters. When these requests are deemed to be "sensitive," according to an internal scale that determines the degree of "sensitivity" and the extent of any political risks, they are routed directly to the ministers' offices or to the Prime Minister's Office, or turned over to committees of communication specialists. Everything is done on a basis of risk management and crisis management, and that invariably extends the time needed to respond to the requesting parties. Not all requests, then, are treated equally, as they should be under the Act.

Roberts also reports that a number of government officials hesitate to record information, thinking that the "less we have on file, the better." Factors that can limit the possibility of transcribing information include budget cuts, the decline of formality in the decision-making process in the federal government, and new technologies (such as the wireless e-mail device).

Several other reasons, according to Roberts, explain the resistance by many government officials to access to information legislation. They include the nature of parliamentary politics, the tendency of the party in power to employ defensive strategies, and the complexity of the governance environment. There is also an erosion of the ability to govern efficiently, resulting from greater fiscal constraints, proliferating interest groups, globalization, and the appointments of more outside players such as auditors, commissioners and ombudsmen. The decline in government authority, the new media environment, new technologies and constitutional issues are also factors contributing to the destabilization of an already complex environment. The access to information legislation adds yet another layer of complexity.

Roberts maintains that the culture of "openness" has proven to be "elusive." He does not detect a "profound shift in bureaucratic culture in Commonwealth jurisdictions," though he warns we should not conclude that disclosure laws have failed as tools for obtaining information. Quite the opposite, he contends, given that government departments have had to disclose sensitive information. He recommends that we ought to construct "rules of engagement that are transparent, perceived as fair and appropriately enforced." In this light, he urges that steps be initiated to strengthen the capacity of access to information coordinators as guardians of the smooth functioning of the process.

Roberts explores the application of the access to information legislation to bodies working for or with Government. He argues that the list needs to be revised according to the following criteria: when the body is completely or partially funded by parliamentary appropriations or represents a component of the administration of a parliamentary institution; when it represents a parent body (parent company) belonging in whole or in part to the Government of Canada; when it appears in Schedules I, I.1, II and III of the *Financial Administration Act*; when it or a parent body in the Government is directed or managed by one or more people designated as being under federal trusteeship; when it offers products and/or services to the Government of Canada or to one of its institutions; when it offers products and/or services in an area of federal jurisdiction in which essential services are provided to the population (health, safety, the economy, and protection of the environment).

Roberts offers a number of specific suggestions, including strengthening the role and responsibilities of the Commissioner; limiting special treatment practices at the request of the requesting party; limiting the circulation of information so as to decrease response time; granting more authority and autonomy to the coordinators; adopting the "duty to assist" concept in requests and responses; reviewing the legitimacy of the process for appointing commissioners (he recommends establishing an independent committee); and including new organizations in the Act when they are created and making them automatically subject to the legislation.

He concludes that access to information legislation requires reform. He urges the government to address the problem of adversarialism directly and to amend the legislation to accommodate new realities of governance. In particular, there is a need to recognize that the public sector has changed and that it now consists of a variety of governmental, quasi-governmental and even private sector actors. Legislation needs to take account of this change and of other developments.

"The *Lobbyists Registration Act*: Its Application and Effectiveness," by Paul Pross, reports on the *Lobbyists Registration Act* that came into force on September 30, 1989. Amendments in 1995, 1996, 2003 and 2004 introduced incremental changes that reflected experience with its provisions and with the need to support its stated goals with real legislative muscle. However, refinements are still needed. Pross reports that the initial Act defined a lobbyist as anyone who receives payment to represent a third party in arranging meetings with public office holders or in communication with them concerning the formulation and modification of legislation and regulations, policy development, and the awarding of grants or contracts (s. 5). The Act recognized the legitimacy of lobbying, established a registry, and required consultant lobbyists and those working for corporations and non-profit organizations to report the names of their clients, or employers, and the subject matter of their undertakings. Penalties were set out for failing to register.

Pross writes that the aims of the Registry were modest, the powers of the Registrar limited, and the resources of the Lobbyists Registration Branch sufficient only to inform Canadians of the identity of lobbyists working on selected files. It reflected the Mulroney Government's view that lobbying should be monitored, but not regulated, and that public disclosure, not prosecution, would best preserve the integrity of the policy-making process.

In its current version, the Act creates the following regime:

- Three classes of individuals—consultant, corporate and association lobbyists—must register any paid undertaking that involves communicating with public officials with respect to the development, or defeat, of legislative proposals, regulations, public policies and programs, and the awarding of grants and contracts. Volunteer lobbyists are not required to register.

- Some specified materials are exempt: official representations by employees of other governments; communications with officials concerning the routine application of regulations; and the presentations made by all interests before commissions of inquiry, parliamentary committees and other hearings that are on the public record.

- Registration must occur within defined time limits, and, in addition to identifying the lobbyist and lobbying firm, must disclose (a) the names of clients (or employers); (b) the subject matter of communications with public officials; (c) any official positions previously held by lobbyist in the Government of Canada; (d) the names of the agencies lobbied; and (e) the communications techniques employed.

- Because consultant, association and corporate lobbyists work in somewhat different circumstances, they report their undertakings differently, though essentially the same information is required of each.

- A code of conduct is laid out and must be observed by lobbyists.

- The Registrar of Lobbyists' responsibilities include monitoring of the code and the administration of the registry, including conducting audits of registrations and, where necessary, reviewing the information provided by lobbyists. The Registrar reports annually to Parliament and must also provide Parliament with the final report of any investigation carried out under the Act.

From its inception, "registration, but not regulation" has been a key feature of the regime established by the *Lobbyists Registration Act*. Successive governments have attempted to create a system that neither discourages the general public from petitioning government nor creates a regulatory process bedevilled by excessive information and unenforceable reporting requirements. This approach, Pross reports, has achieved some worthwhile results. It also, however, until recently, ensured that those responsible for administering the Act could not effectively fulfill its objective of ensuring that "public office holders and the public be able to know who is attempting to influence government."

The weaknesses of the *Lobbyists Registration Act* centre on five areas: securing compliance, providing clear instructions to lobbyists and officials, defining an appropriate disclosure regime, investigating infractions, and ensuring the independence of the Registrar.

Pross suggests that the problem is best addressed through a multifaceted outreach program, including training for public servants, providing better and more accessible information, and involving business groups and the media in putting more information about registration before the general public. Training and expanded public knowledge of lobbyist registration should, however, be reinforced with policies that require public servants to be more alert to the registration process and oblige them to establish and, where necessary, report the lobbyist status of individuals communicating with them. He notes, however, that unless staffing at the Branch is considerably increased, significant non-compliance—intentional and inadvertent—will continue. More staff is needed to verify registrations, monitor compliance, and investigate non-compliance, on the one hand, and, on the other, to put the outreach program into effect.

In addition, Pross makes several suggestions to improve disclosure. In response to arguments that political operatives ought to be banned from participating in lobbying, he suggests that a more effective approach would be to require disclosure of party positions held and to introduce changes to election finance rules that would equate volunteer time donated to political parties to financial contributions. Other proposals relate to the previous employment of volunteers, and to lobbyists' participation in conferences and meetings.

Pross also looks at the Registrar's independence. He recommends that, for two reasons, both the Registrar and the Office should be placed under the supervision of Parliament itself: at present, the Registrar is subject to the pressures that ministers and other senior officials can bring to bear on it; and the Office is vulnerable to budgetary, staffing and organizational decisions that can, subtly or not, severely limit its effectiveness.

"For the Want of a Nail: The Role of Internal Audit in the Sponsorship Scandal," by Liane Benoit and Ned Franks, describes and analyzes the Public Works and Government Services Canada (PWGSC) internal audit function in relation to the evolution of the Sponsorship Program from 1995 to 2000; canvasses a range of explanations for the failure of internal audit during this period; and assesses the October 2005 accountability and financial management reforms of the Government of Canada.

Benoit and Franks describe how, in late 1994, the PWGSC staff responsible for advertising/sponsorship procurement (negotiating contracts with agencies) were moved into a new unit under Charles "Chuck" Guité, who was already responsible for the selection of advertising firms and for monitoring government advertising. This amalgamation removed the existing structural checks on sponsorships and advertising contracting. The PWGSC Audit and Review Branch advised on a management control framework for the newly established unit, the Advertising and Public Opinion Research Sector (APORS). Its report identified a high level of risk inherent in the organizational independence and apparent politicization of APORS and recommended an early compliance audit of the amalgamated unit. Twice (in 1995–1996 and 1996–1997), the recommendation was not followed. Meanwhile, in mid-1996, following a complaint to his union, Allan Cutler's allegations of contracting irregularities were considered by the Audit and Review Branch, which recommended further investigation. This review led to two consequences: a modest internal compliance audit conducted by Ernst & Young, and reprisals against Mr. Cutler that emphasized Mr. Guité's impunity.

Drafts of the 1996 Ernst & Young audit noted the limited scope of the audit, identified major areas of risk, and directly addressed contracting irregularities. On the insistence of the Audit and Review Branch, these passages were removed. The final report also included misleading statements to the effect that no evidence of personal gain or benefit had been detected, and that APORS lacked expertise in the procurement function. This deceptive information formed the basis for the PWGSC Audit Committee's acceptance of the final report and the resulting Action Plan prepared by Mr. Guité; it may also account for Treasury Board's inaction when it received summaries of these documents.

The next internal audit was conducted in 2000, in the wake of the HRDC scandal. It identified irregularities very similar to those found in 1996, but again PWGSC muted their seriousness with "soft language;" moreover, all references to the 1996 report and its disregarded recommendations were deleted. The failure of PWGSC to acknowledge the similarities with the 1996 audit results, and the fact that nothing was done about them, amounted to deliberate concealment, a "total abdication of integrity" in the PWGSC internal audit. Nonetheless, the Sponsorship Program had, by 2000, attracted enough scrutiny from outside PWGSC that the attempt at concealment failed, and various other audits were conducted over the 2000–2003 period.

In the second part of their paper, Benoit and Franks canvass cultural, institutional and structural factors that might have led PWGSC auditors to avoid investigating activities that posed such risks to the Department. Among the possibilities cited are incompetence and/or poor judgment on the part of senior PWGSC audit officials; "structural politicization," whereby public servants identified with Mr. Guité's efforts to preserve national unity at any cost; and political interference. It may also be that the audit officials simply believed Mr. Guité's version of events over Mr. Cutler's. They note that, in general, the pattern of interaction between audit staff and departmental managers can sometimes reflect a "clash of cultures" and result in personal or organizational rivalries.

Benoit and Franks make the point that internal audits are no longer genuinely internal, as they can be released under the access to information (ATI) regime. Laypersons are not attuned to the differences in meaning and purpose between internal and external audits and believe all audits are concerned with financial probity. After ATI came into effect in 1983, managers became more concerned over the language and findings of internal audits, with a view to possible public disclosure of these documents. Serious negotiations between managers and auditors or auditors and outside contractors are often pursued; the result is a tendency to obfuscation. The ability to control the language of audit reports can become more difficult when outside auditors are employed to assist in internal audits. While consultants are usually responsive to the wishes of their clients, and many will revise reports accordingly to ensure further business, the issue becomes ethically more difficult when both parties are not in tune with the larger interests of the organization. The authors observe that the tendency for departments to sanitize reports for public consumption affects the utility of the internal audit as a reliable management tool. It can also seriously mislead deputies and audit committees that rely on the integrity of this information to make organizational decisions.

Benoit and Franks summarize the October 21, 2005, government reforms aimed at improved accountability and financial management. They note that the overall direction is to bring the audit regime in line with private sector practices. They argue that, in contrast to the Auditor General and the findings of Justice Gomery in his first report, the reforms attribute the Sponsorship affair to an internal failure of bureaucratic control, not to external political pressure. Assuming, however, that the Sponsorship problem was the fault of easily intimidated departmental officials, the reforms' reinforcement of ministerial and central agency power is likely to make matters worse. They also point out that the President of the Treasury Board is now suggesting that ministers, not deputies, be the primary managers of departments. This understanding reverses the assumptions behind the current machinery of government and the *Financial Administration Act*. They add that the approach to audit appears designed to shift the internal audit function into a hybrid form, which would aim to provide assurances associated with external audits, and that the new departmental Chief Audit Executive function introduces a dual reporting relationship into the departmental structure, which further obscures accountability.

Benoit and Franks emphasize the significance of restructured departmental audit review committees and the large number of external (outside-the-department) experts who will be involved under the new scheme. Among the issues raised by this innovation are (a) the risk of patronage and/or politicization in the appointment and operation of these committees; (b) disrupted minister-deputy relations stemming from annual in-camera meetings between the committees and ministers, which exclude the deputy minister; and (c) the conflict, suspicion and resentment that are likely to arise from a scheme that has deputies (as members of audit review committees) provide assurances to ministers for other departments. Another issue of confused accountability could arise when a committee provides a minister with false assurances (possibly based on misleading audit reports); in that scenario, the minister and the deputy will both be in a position to blame the outside body for its failure to identify the department's errors.

Benoit and Franks argue that restoring the Office of the Comptroller General means more audits, along with greater central agency involvement. While there is clearly a need for improved internal audit, they see the prospect of an oppressively intrusive audit regime and a resulting cost in the morale and self-esteem of officials. They offer a number of concluding observations:

- The reforms neglect a salient issue in the failure of the PWGSC internal audit—the impact of ATI on internal audit integrity; Benoit and Franks suggest that the demands of transparency could be met by publishing only summaries of internal audits.
- The reforms do not address the classification of departmental auditors, and therefore appear to neglect serious issues of quality and professionalism.
- The Sponsorship affair demonstrated the need for a public service with the confidence to resist political interference. Instead, the reforms empower central agencies at the expense of departments and exaggerate ministerial management at the expense of deputy ministers.

"Federal Government Advertising and Sponsorships: New Directions in Management and Oversight," by Ian Sadinsky and Thomas Gussman, states that an unholy alliance has existed between advertising agencies and political parties ever since Confederation in 1867. The understanding of this alliance is straightforward: "Work for our party for free or at a substantially reduced cost during the election campaign, and you will be rewarded with contracts, should we be elected." This tradeoff, the authors point out, runs counter to traditional values found in Canadian public administration.

In addition, Canada's population is now well informed and highly educated, compared with the situation 40 years ago. There has also been a concerted effort in recent years to strengthen standards of transparency and accountability in government through various measures. One such measure is the election financing reform initiative, which makes it easier for political parties to pay election campaign costs. To be sure, the Sponsorship scandal also brought home the point to many Canadians that something needed to be done to further strengthen administrative processes and financial management in government.

Sadinsky and Gussman outline a number of overriding objectives in the management of government communications activities, including both advertising and sponsorships. These objectives include the effectiveness of the program; value for money; transparency; fairness; proper oversight; flexibility; accountability of political officials, public servants and service providers; and capacity development through a skills and training program.

Sadinsky and Gussman report that the Government of Canada has introduced a number of measures during the past three years designed to strengthen management practices in advertising. They include increasing the number of suppliers for advertising, the number of opportunities for firms to compete, and the variety of contracting tools; and payments based on hourly remuneration, as opposed to the former commission-based remuneration. Other methods of payment, such as retainers and performance-based methods, can be considered when warranted. Additional measures include the selection of a new Agency of Record through a competitive Request for Proposal (RFP) process; establishment of a Canadian content requirement of 80 percent; and new requirements to increase transparency.

But that is not all. The Government has also introduced several administrative and structural changes, including the creation of two new responsibility centres to manage advertising activities, such as procurement, and a priority-setting unit for all government advertising in a central agency (the Privy Council Office). In addition to these changes, there are new financial management oversight measures, including the establishment of a Chief Financial Officer in every department.

Sadinsky and Gussman applaud the reform measures and make the case that they could well make "less likely" the risk of another sponsorship scandal. Nonetheless, they call for even more measures. They ask, for example, whether PCO is the right place to locate responsibilities for advertising, given its close relationship to the Prime Minister's Office. They look to experience elsewhere for the answer. In the case of the Ontario government, new measures have been introduced to isolate advertising activities from partisan considerations. The Auditor General of Ontario (AG) must review most advertising in advance and can also establish an Advertising Commissioner to undertake a review of advertising issues on his or her behalf. As a result of this process, any advertising items deemed not suitable cannot be used, and the AG's decision is final. The AG also reports annually to the Speaker of the Legislative Assembly on any contravention of the new law and on advertising expenditures (both for government advertising generally and for specific advertising items reviewable under the law).

The authors attach a great deal of importance to professional credentials and to training and skills development. They applaud recent government efforts in this area. They insist that advertising is a sophisticated communications field that requires specific skills and a proven track record.

They also review the means to reduce the unholy alliance between advertising agencies and political parties. However, they are reluctant to support a "cooling off" period for agencies working on political campaigns before they can bid on government contracts. Companies and individuals should not be denied their democratic rights to participate in elections—but they should also not be unfairly rewarded for their participation.

Sadinsky and Gussman note that the federal Government has become "gun shy" about sponsorship programs, and this withdrawal has caused concern, especially among small organizations. They affirm that government advertising and sponsorship activities are legitimate, if properly managed. They offer advice should the Government decide to re-enter the sponsorship field. They recommend that (a) sponsorship activities be conducted in a fair and transparent manner, free from political interference in the selection and management of individual sponsorship activities; (b) sponsorship activities be clearly identified and described in all planning, management and reporting documents to departmental management, central agencies and to Parliament; (c) regular evaluations and audits be undertaken to ensure that sponsorships are meeting stated objectives, providing value for money, remaining free from partisanship in their management and administration, and not creating unintended consequences; and (d) if a central focus for a formal sponsorship program is required, it should be in a program department, rather than in a central agency or a common service organization. It might also be useful to have an advisory group which could provide technical advice to departments that are contemplating or entering collaborative or sponsorship activities. This group could, for example, be associated with the Federal Identity Program office in the Treasury Board Secretariat or with the Advertising Coordination and Partnerships Sector in PWGSC.

The authors conclude that the Office of the Comptroller General may prove in the long run to be the most neutral location in which to house the overall coordination of advertising. Given the current preoccupation of that Office with implementing a new audit regime and raising professional standards, they believe that the function should remain for the present in the custody of PCO, given the safeguards put in place.

DEFINING BOUNDARIES: THE CONSTITUTIONAL ARGUMENT FOR BUREAUCRATIC INDEPENDENCE AND ITS IMPLICATION FOR THE ACCOUNTABILITY OF THE PUBLIC SERVICE

Lorne Sossin

1 Introduction

This paper will explore the constitutional boundaries which establish the basis for relations between the political and bureaucratic spheres of government.[1] Some suggest the boundaries between Ministers and political staff on the one hand (who I will refer to together as "the political executive"), and public service managers, public officials and line employees of government on the other hand (who I refer to collectively as the "public service"), are matters of political expediency rather than constitutional principle.[7] I believe the primacy of political expediency has created a climate with insufficient safeguards against political interference in public service decision-making. In my view, recognizing the primacy of constitutional principle would be a salutary and constructive response to the Sponsorship Affair and ought to underpin any recommendations aimed at preventing incursions against the non-partisan character of the public service in the future.

Treasury Board is the government department responsible for public service management. In the recent Treasury Board report, "Review of the Responsibilities and Accountabilities of Ministers and Senior Officials,"[8] prepared as a response to the 2003 Auditor General's Report into the Sponsorship Program, the lack of constitutional status of the public service is described in the following terms:

(Emphasis added)

> Departments, as apparatuses for the exercise of authority and responsibilities that reside in ministers, are the basic organizational unit of executive administration in the Westminster system, and ministers act principally through the public servants in their department. The role of the Public Service is to advance loyally and efficiently the agenda of the government of the day without compromising the non partisan status that is needed to provide continuity and service to successive governments with differing priorities and of different political stripes. In order to do this, public servants must provide candid, professional advice that is free of both partisan considerations and fear of political criticism, which in turn requires that they remain outside the political realm. But, while public servants provide advice, the democratically elected ministers have the final say, and public servants must obey the lawful directions of their minister. In short, all government departments, and all public servants who work for them, must be

> accountable to a minister, who is in turn responsible to Parliament. Were this not so, the result would be government by the unelected. *In keeping with these principles, public servants as such have no constitutional identity independent of their minister.*[1]

It is true that no express provisions in any of Canada's constitutional texts accord the public service constitutional status (as they do, for example, the judiciary), but it is equally true that a range of unwritten constitutional conventions and principles clearly give rise to obligations, responsibilities and constraints on decision-making by members of the public service which arguably together confer constitutional status on the public service as an organ of government. Thus, in my view, it is misleading to suggest that public servants have no constitutional identity independent of their Minister, or to suggest that public servants are subject to no constitutional or legal accountability beyond loyalty to their Minister. I elaborate on this conclusion below.

While I believe that constitutional norms provide the point of departure for the doctrines and principles which govern the public service, there is little to be accomplished by simply cataloguing such doctrines and principles. It is important to determine how these boundaries operate, and to ensure, when necessary, they function as "lines in the sand" and not merely "ropes of sand." To this end, these boundaries must be articulated and enforced in ways that are compatible with democratic institutions and political realities. If the integrity of these boundaries is to be sustained, they must permeate the culture both of the political executive and the public service. The Sponsorship Affair has illustrated a culture where the boundaries between the interests of Ministers and the obligations of public servants were blurred and distorted.[3] Clearly, the status quo can and must be improved upon.

The analysis below is divided into two parts. The first part will explore the legal and constitutional terrain of the relationship between the political executive and the public service, including the constitutional convention of public service neutrality, the constitutional principle of the rule of law, and the common law duty of loyalty operating on public servants in their relationship with the political executive. While this section focuses on the constitutional rationale for boundaries between the political and public service spheres, mutual respect and interdependence between the various organs of the executive branch of government are key prerequisites for the success of government and a foundation of Westminster democracy. Mutual respect and interdependence are only possible, I argue, between organs of government which also enjoy separate identities and a measure of independence from one another. The second part of this paper will explore avenues to develop, monitor and enforce the boundaries identified in the first part. These avenues may include judicial review, Auditor General's investigations, public inquiries, parliamentary committees, and Privy Council Office (PCO) or Treasury Board reviews, but I conclude that there is a compelling case for a truly independent Public Service Commission, with supervisory jurisdiction over enforcing and adjudicating a revamped legislative Public Service Code (which could form the basis for a robust campaign of public education and professional training initiatives).

2 The Constitutional and Legal Terrain

2.1

Constitutional Boundaries

The first section of the paper canvasses the constitutional bases for the boundaries between the political and bureaucratic spheres of executive government. At least two constitutional principles directly address the role and responsibility of executive decision-makers: First, the constitutional convention of bureaucratic neutrality operates to ensure that public servants owe a primary obligation to the Crown (and, by extension, to the people of Canada) and not to the party which happens to control the government of the day; and second, the rule of law ensures that executive decision-making is animated only by proper purposes, good faith and relevant criteria set out by law. Together, I argue, these principles represent a constitutional norm of bureaucratic independence. This norm suggests a requisite spectrum of separation between bureaucratic and political decision-making. In some areas, this separation will be near absolute, as in the case of criminal justice decision-making involving courts or prosecutors. In other cases, such as policy-making spheres, where political direction may be decisive, the separation may be subtle. The Sponsorship Program, and procurement generally, lie toward the end of the spectrum requiring more independence. While political direction may create a sponsorship program, for example, it is difficult to imagine appropriate political intervention in the decision as to which advertising agency to award a contract.

2.1.1 The Constitutional Convention of a Non-partisan Public Service

The point of departure for any discussion of public service independence as a constitutional norm is the constitutional convention that the public service remains neutral as between partisan interests (the "Convention").[4] Kenneth Kernaghan has outlined the content of the Convention in an oft-cited list of six key principles:

(1) Politics and policy are separated from administration; thus, politicians make policy decisions and public servants execute these decisions;

(2) Public servants are appointed and promoted on the basis of merit rather than of party affiliation or contributions;

(3) Public servants do not engage in partisan political activities;

(4) Public servants do not express publicly their personal views on government policies or administration;

(5) Public servants provide forthright and objective advice to their political masters in private and in confidence; in return, political

executives protect the anonymity of public servants by publicly accepting responsibility for departmental decisions; and

(6) Public servants execute policy decisions loyally, irrespective of the philosophy and programs of the party in power and regardless of their personal opinions; as a result, public servants enjoy security of tenure during good behaviour and satisfactory performance.[7]

There is, in my view, an important omission in this list. The Convention also includes the duty of public servants to question and, if necessary, to decline to follow instructions which are motivated by improper partisan interests. While Ministers are responsible for the decisions of the department, officials alone are responsible for their obligation to remain non-partisan. In relation to the Crown, the public service serves as guardians of the public trust (and, by extension, the public purse). In addition to their primary constitutional obligations toward the Crown, public servants also owe a common law obligation of loyalty to the government of the day, which includes a duty to carry out lawful instructions and not publicly criticize government policy or take public sides in partisan debates. The limit on this secondary obligation of loyalty to the government is dictated by the primary obligation of responsibility to the Crown. In other words, it is not constitutionally permissible for public servants to discharge their loyalty to the government of the day where to do so would require public servants to take part in partisan activities (or, as discussed below, to contravene the rule of law).

While the Convention could suggest that the public service operates independent of the political executive, in many if not most governmental contexts, government could not function on such a basis. Public servants are deeply enmeshed in supporting the political executive as it forms and finalizes policy preferences. Public servants help in shaping legislation and have a leading role in the drafting of regulatory and policy instruments to further legislative aims. Public servants give life to government programs through the exercise of discretion and control over implementation. Public servants are responsible for oversight through internal audits and accountability measures. In many of these settings, senior public servants work hand in glove with political staff in the employ of Ministers (referred to federally as "exempt staff," as they are exempted from the terms of the legislation which applies to the public service), who themselves may be deeply enmeshed in decision-making around policy formation and issues management. As a former senior public servant opined, the idea that you can keep the political and bureaucratic roles distinct at the highest levels of government decision-making is "naïve and non-productive."[8] It is because of this commingling of the bureaucratic and political, however, that the constitutional principles which demarcate the appropriate sphere of bureaucratic and political activity become so crucial.

The interdependence of the bureaucratic and political domains of the executive can be threatened in two ways: first, when the political executive (i.e. the PM and PMO, Cabinet Ministers and their political staff) seeks to politicize the public service for its own advantage; and second, when public servants act for partisan ends on their own initiative. In the case of the Sponsorship Affair, the Convention was compromised in both senses. It has been in response to such threats that the courts, elaborating upon the Convention, have played a central role.[9]

In order to determine how best to articulate and enforce the Convention, it is important to place it within the context of the general rules applicable to constitutional conventions. Constitutional conventions are not part of written constitutional texts but arise from historically accepted practices and customs with respect to the machinery of government. In *OPSEU v. Ontario (A.G.)*,[10] the Supreme Court of Canada offered the following observation on conventions:

> As was explained in Re: Resolution to amend the Constitution, [1981] 1 S.C.R. 753, at pp. 876-78, with respect to the Constitution of Canada—but the same can generally be said of the constitution of Ontario—"those parts which are composed of statutory rules and common law rules are generically referred to as the law of the constitution." In addition, the constitution of Ontario comprises rules of a different nature but of great importance called conventions of the constitution. The most fundamental of these is probably the principle of responsible government which is largely unwritten, although it is implicitly referred to in the preamble of the Constitution Act, 1867...[11]

The constitutional convention of a politically neutral public service is part of what is sometimes referred to in the public administration literature as the "iron triangle" of conventions consisting of political neutrality, ministerial responsibility and public service anonymity.[12] The fact that these duties are not part of the written Constitution does not detract from their centrality to Canada's constitutional system.[13] Put differently, a non-partisan public service is as important as ministerial responsibility to Canada's constitutional order. However, as Wade and Forsyth explain, writing in the British context, the convention of neutrality and anonymity for public servants may be seen as interwoven with ministerial responsibility:

> The high degree of detachment and anonymity in which the civil service works is largely a consequence of the principle of ministerial responsibility. Where civil servants carry out the minister's orders, or act in accordance with his policy, it is for him and not for them to take any blame. He also takes responsibility for ordinary administrative mistakes or miscarriages. But he has no duty to endorse unauthorised action of which he disapproves, though he has general responsibility for the conduct of his department and for the taking of any necessary disciplinary action.[14]

As Kernaghan has observed, ministerial responsibility is rarely defined, and this lack of a shared understanding of its requirements "permits confusing, creative, and misleading interpretations of its meaning."[15]

While the principle of a neutral public service may well complement the principle of ministerial responsibility, the better view in my opinion is that the neutrality and impartiality of the public service is not contingent on ministerial responsibility and represents instead a free-standing constitutional principle, which owes its modern origins to the rule of law. Whether Ministers actually resign when they should, or actually can make their ministries as accountable to the legislature as they should, the logic behind insulating public servants from undue political interference, and restricting partisan activities among public servants, remains justified. In other words, even if the principle of ministerial responsibility erodes, as many have suggested it has,[16] this does not undermine the rationale or requirement for a neutral public service. Indeed, as the Sponsorship Affair demonstrates, the more the concept of ministerial responsibility appears out of step with the actual practices of government, the more the importance and urgency of an independent public service grows.

Conventions do not and cannot exist in the abstract. They are constitutional rules whose contours are set by practice over time — they are determined to a considerable extent on a particular view of history. The history of the public service, however, reveals several different stories. At least since the time of Confederation, a principal feature of responsible government in colonial Canada was security of tenure for public servants, but the merit system did not take hold in Canada until the late 19th and early 20th Centuries.[17] Patronage was rampant,[18] remains common in a variety of board and agency appointments and is not precluded even at the highest levels of the public service.[19] Public service anonymity is now routinely breached.[20] Not only are such breaches of anonymity common, they are, I would suggest, now expected. In an era where "secret guidelines" and "behind-closed-door" politics are viewed as inconsistent with transparent accountability, public service anonymity would be viewed favourably in few quarters. Naming public officials, however, should not be interpreted as sanction for the public humiliation of public officials. The value at stake in such settings is not secrecy but respect for the public service as an institution.

In OPSEU v. Ontario (A.G.), the Supreme Court appeared to recognize the aspirational quality of political neutrality as a convention rather than its empirical foundation in political practices of the time. The Court cited with approval the following passage by MacKinnon ACJO, writing for the Ontario Court of Appeal:

> Clearly there was a convention of political neutrality of Crown servants at the time of Confederation and the reasoning in support of such convention has been consistent throughout the subsequent years. Whether it was honoured fully at that time in practice is irrelevant. The consideration is, as stated earlier, not as to the social desirability of the legislation but rather the fact that historically there was such a convention existing in 1867. It is difficult to take exception to Mr. Justice Labrosse's conclusion that: "Public confidence in the civil service requires its political neutrality and impartial service to whichever political party is in power" (p. 173 O.R., p. 328 D.L.R.). The impugned provisions seem to do no more than reflect the existing convention.[71]

In other words, whether a non-partisan public service represented the rule or the exception at Confederation is not the point of the inquiry. History has a vote but not a veto over the scope of constitutional conventions. Ultimately, it falls to judges, not historians, to determine their reach. While they may determine the requirements of such conventions, courts cannot order either the executive or the legislative branch to comply with them.[72] Nonetheless, the importance of conventions has been enhanced by the growing significance of unwritten constitutional principles more generally and the strengthening of the role of the courts as a catalyst for constitutional evolution through the exposition of such principles.[73]

The most detailed discussion of the effect of this convention is contained in the Supreme Court's judgment in *Fraser v. Public Service Staff Relations Board*.[74] Fraser was a gadfly who worked at Revenue Canada, but whose hobby appeared to be publicly criticizing the government's policies, especially on metrification (he was photographed in the *Whig-Standard* with a placard that read "your freedom to measure is a measure of your freedom").[75] Mr. Fraser was sanctioned for his conduct and challenged this sanction on the grounds that public servants should be free to criticize the government of the day if they disagree with their policies or practices. In the course of finding that Mr. Fraser enjoyed no legal protection against being sanctioned for his behaviour, the Supreme Court held that "[A] public servant is required to exercise a degree of restraint in his or her actions relating to criticism of government policy, in order to ensure that the public service is perceived as impartial and effective in fulfilling its duties."[76] Dickson C.J. characterized the public service as built around values such as "knowledge…fairness…and integrity" and emphasized that its duty of loyalty was to the Government of Canada, not to any political party that might enjoy power at the time.[77] Dickson C.J. invoked the "tradition" in the Canadian public service which "emphasizes the characteristics of impartiality, neutrality, fairness and integrity."[78]

While finding no bar to the sanctions in the case before him, Dickson C.J. asserted that it would be inappropriate to penalize a public servant for opposing government policy in public where the government was involved in illegal acts; or where the government's policies jeopardized the life, health or safety of public servants or others; or where the public servant's criticism has no impact on his or her ability to perform effectively the duties of a public servant or on the public perception of that duty.[29] In other words, if this logic is followed, all public servants enjoy a measure of legal protection should they decide to become “whistleblowers,” whether or not specific whistle-blower legislation exists to protect them.[30] The Court in *Fraser* affirmed that a public servant’s duty of loyalty to the Crown, and through the Crown to the public interest, must in some circumstances be a higher obligation than the duty of loyalty owed to the government of the day. Even to characterize this as a convention raises questions. Could a government enact legislation exempting some or all of the public service from its non-partisan obligations? I would suggest a non-partisan public service is a constitutional norm or principle which reflects a crucial check on executive authority and could not be open to manipulation for partisan ends. An attempt to accomplish this, whether by legislation or executive action, would be in my view an unconstitutional act.

The principle of bureaucratic neutrality has been described by courts as “a right of the public at large to be served by a politically neutral civil service,”[31] as an “essential principle” of responsible government,[32] as a matter of the “public interest in both the actual, and apparent, impartiality of the public servant,”[33] and finally, as an “organ of government.”[34] Can a non-partisan public service be simultaneously a “right” of the people, an “essential principle” of responsible government, and a “policy” in the public interest? The answer is undoubtedly that constitutional conventions (as well as norms and principles) can and do have multiple rationales and serve multiple ends. This is consistent with what might be accurately characterized as the plural nature of the executive branch in Canada’s constitutional system.[35] Another example of a plural requirement in Canada’s constitutional order is the requirement to preserve and promote the rule of law, to which my analysis now turns.

2.1.2 The "Rule of Law"

Public servants are entrusted with public authority in order to implement the policy agenda of the political executive. They have no legitimate alternative set of interests or agendas, and the existence of such alternative public servant interests and agendas would pose a threat to democratic accountability and Westminster principles under which all public authority must adhere to the rule of law.[56] Parliament, the political executive and the public service all must conform to the rule of law, and this is a separate and independent duty on each organ of government.

The obligation to comply with the rule of law would be a straightforward constraint on government action but for the fact that the rule of law is a deeply contested notion which also must be balanced against other unwritten constitutional principles such as democracy and parliamentary sovereignty.[57] While the rule of law has been recognized as the animating principle for the judicial review of administrative action,[58] and is mentioned alongside the supremacy of God in the preamble to the *Charter of Rights*, the rule of law remains largely unexplored as a constitutional norm by courts in Canada. In the *Secession Reference*, where the Supreme Court of Canada affirmed the rule of law as an underlying constitutional principle, it described the importance of the rule of law in terms of subjecting executive authority to legal accountability and protecting citizens from arbitrary state action:

> The principles of constitutionalism and the rule of law lie at the root of our system of government. The rule of law, as observed in *Roncarelli v. Duplessis*, is "a fundamental postulate of our constitutional structure." As we noted in the *Patriation Reference*, supra, at pp. 805-6, "[t]he 'rule of law' is a highly textured expression, importing many things which are beyond the need of these reasons to explore but conveying, for example, a sense of orderliness, of subjection to known

> legal rules and of executive accountability to legal authority." At its most basic level, the rule of law vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs. It provides a shield for individuals from arbitrary state action.[39]

The executive accountability to legal authority referred to in this passage is accomplished by another constitutional postulate—all executive authority is subject to judicial review on the grounds that the rule of law has been contravened.[40]

While the rule of law imposes a special set of duties on government lawyers and the Attorney General as Chief Law Officer (which includes, for example, the obligation on a Deputy Attorney General to resign if an Attorney General rejects advice that a particular course of action is unconstitutional, and a correlative duty on Attorneys General to resign if Cabinet refuses their advice on similar questions),[41] its reach is not and should not be limited to lawyers or judges. The rule of law doctrine imposes a public trust obligation on public servants to ensure that the rule of law is respected and that government directions which are inconsistent with the rule of law are not followed. To view the administrative state in rule of law terms means, for example, that it would be unlawful for a public servant to carry out an exercise of public authority which was based purely on political whim or the desire to curry favour with political authorities or through improper political pressures.[42] This also suggests that public servants have a constitutional obligation not to carry out directions which are themselves unlawful.[43] But how is the rule of law, in this sense, to be enforced?

In *Public Service Alliance of Canada v. Canada*,[44] one of the few cases to raise the implications of the rule of law as an underlying constitutional norm in the context of regulating the public service, the Federal Court considered whether federal "back to work" legislation rendered ineffective a negotiated agreement which confirmed correctional officers' right to strike. The Public Service Alliance of Canada argued that the legislation violated the rule of law. The Court rejected this argument on the grounds that an underlying constitutional principle such as the rule of law, even if it could be said to be violated (on which the Court declined to make a finding), could not have the effect of invalidating legislation.[45] In *Lalonde v. Ontario (Commission de Restructuration des Services de Santé)*,[46] however, the Ontario Court of Appeal confirmed that underlying constitutional principles, in that case the principle of protecting minority rights, constrain the exercise of discretion and application of public authority, and in that case effectively reversed a government decision to close a hospital serving a minority francophone population.

If the rule of law is to play a constructive role in boundary drawing between political and public servant spheres, this will have to do so through the inculcation of administrative culture. Courts, tribunals, Auditors General, and public service commissions all provide important venues where these boundaries are identified and developed, but it is what lies below the surface that matters most. Bureaucratic independence, in other words, rises or falls with the day-to-day values of the public service (and of the political executive), rather than with the occasional, ex-post pronouncements of those exercising oversight.[47] Without a rule of law culture, proliferating rules and procedures are unlikely to produce accountability or compliance with a set of institutional boundaries.

To understand how the rule of law may shape the relationship between the public service and the political executive, consider the example of the "Magna Budget" affair in Ontario. In the spring of 2003, the then Tory government announced it was going to announce its annual budget, not in the Legislature, but rather in a closed circuit studio hastily erected at a Magna auto parts plant owned by a prominent and generous supporter of the Progressive Conservative Party (it was later introduced in the House in the usual manner). A minor constitutional crisis ensued. Critics in the media and opposition decried the arrogance of the decision to "end-run" legislative debate on the budget, while the Speaker of the House obtained a legal opinion suggesting the decision violated parliamentary and constitutional convention.[48]

The "Magna Budget" implicated bureaucratic independence in at least two ways. First, it fell to the constitutional lawyers of the Attorney General's office to ensure that the government was not embarking on an unconstitutional course of action, and second, it fell to Cabinet Office to ensure that public servants and public resources were not deployed in support of partisan activities The Attorney General, when pressed, would neither confirm nor deny that an opinion on the budget delivery had been sought from government lawyers, but reiterated that he would be compelled to resign if an opinion had been sought and if it had indicated that the proposed course of action was unconstitutional. Therefore, it was by negative implication presumably that the Attorney General was signalling either that no opinion had been sought or that the opinion sought was not unfavourable.[49] The Secretary of Cabinet was asked by the Liberals, then in opposition, to prevent the public service from being dragged into a partisan exercise by providing their services to facilitate the delivery of the budget at the auto parts facility.[50] The Secretary later issued a press release indicating "no civil servant was involved in any inappropriate activity."

The "Magna Budget" reflects both the possibilities and limits of bureaucratic independence. On the one hand, it remained within the power of the Attorney General and Cabinet Office effectively to prevent the budget from being delivered outside the legislature. Both the AG and Secretary of Cabinet were called upon to give, in effect, their imprimatur to the action contemplated by the government. On the other hand, the political realities made that approval almost a foregone conclusion. This is so for at least three reasons. First, determining whether a proposed course of action violates the constitution is more often an exercise in risk analysis than in raising red flags. Even if a *Charter* breach is apparent, it is much more difficult to say with certainty how a court will respond to section 1 evidence. At most, government lawyers could identify a high risk with respect to some courses of action over another. When a government has in fact infringed a convention is less certain still.[11] Thus, occasions when an Attorney General must advise a government not to pursue its desired course will be few and far between (especially where the Attorney General wishes to remain in Cabinet). Second, it is unclear whether the Secretary of Cabinet may seek legal advice independent of the Attorney General's office. Therefore, although the government of the day and the public service might not always have identically convergent interests, they remain bound by the same ambiguities in relation to government legal opinions. Third, there are few if any means to resolve disputes between the head of government and the head of the public service who is herself or himself a political appointee (other than the head of the public service resigning or being replaced, neither of which impose any accountability on the political executive). When push comes to shove, it is the public service that more often than not ends up back on its heels.

Constitutional crises like the "Magna Budget" affair are rare.[12] They reflect only the visible tip of a largely submerged iceberg of political and bureaucratic entanglements. Most forms of political pressure on public service decision-making arise and are resolved quietly, without the anxiety of a constitutional crisis, with a phone call or email between the Clerk of the Privy Council's office and a Minister's office, or between Attorney General lawyers and line ministries, on a weekly and sometimes daily basis. Occasionally, once a month or so, one or two might bubble to the surface and become an issue, briefly, between a Minister and a Deputy Minister, or between Cabinet Office and the Premier's Office. In rare instances, a leaked memo or document leads to some news coverage and perhaps the attention of opposition parties. In the overwhelming majority of cases, few records will attest to the tensions such friction might produce, and more rare still will be records of how such friction will be resolved (i.e. did one side blink or lack backbone, or was a compromise fashioned?). It is far from clear that the status quo provides the public service with the capacity (and legitimacy) to fulfill its obligations to ensure respect for the rule of law. In the current climate, we are left to question whether a culture of intimidation is more likely than a rule of law culture to prevail when political pressure is brought to bear on public servants. Can a rule of law culture, however, flourish in contexts where public servants owe duties of loyalty to carry out governmental direction? It is to this aspect of the relationship between the political executive and the public service that I now turn.

2.2

The Duty of Loyalty

I would contend that neither the Convention of a non-partisan public service nor adherence to the rule of law are incompatible with the public service's duty of loyalty to the government of the day. The ability of that political executive to carry out its policy mandate depends entirely on the loyalty and professionalism of the public service. As the Ontario Law Reform Commission noted, however, one cannot understand the relationship between political neutrality and independence without also factoring in the common law duties of loyalty, good faith and confidentiality:

> The common law duties of loyalty, good faith and confidentiality should be seen, then, as having two essential roles, both of which are manifestations of the "public interest": to secure the sound administration of the various branches of government, and to foster and maintain the traditional independent role of the public service. However, it is essential to emphasize that the "public interest" so served is not monolithic; rather, it is the result of the delicate

> balancing of frequently competing interests, that of the employee wishing to exercise individual rights of expression and to engage in political activity, and that of the government, wishing to maintain the existence and the appearance of independence and impartiality in the public service and to ensure effective administration in the Province.[53]

At least in theory, the duty of loyalty and neutrality are complementary attributes. The relationship between the two was aptly summarized by Sir C.K. Allen in the following terms:

> [T]he civil servant is expected to give, and with very few exceptions does give in full measure, the qualities of loyalty and discretion. He is not to obtrude his opinion unless it is invited, but when it is needed he must give it with complete honesty and candour. If it is not accepted, and a policy is adopted contrary to his advice, he must and invariably does, do his best to carry it into effect, however much he may privately dislike it. If it miscarries, he must resist the human temptation to say "I told you so"; it is still his duty, which again he invariably performs, to save his Minister from disaster, even if he thinks disaster is deserved.[54]

In *Fraser*, Dickson C.J. states that the characteristics of impartiality, neutrality, fairness and integrity are associated with the public service, and a person entering the public service is deemed to understand that these values require caution when it comes to criticizing the government.[55] Knowledge, fairness, integrity and loyalty all are core characteristics which characterize the public service's aspirations.[56] Dickson C.J. recognized a qualified rather than absolute duty of loyalty owed by public servants.[57]

It has fallen to subsequent courts interpreting the qualified nature of this duty to resolve the dilemma raised by *Fraser* — how disputes should be resolved in which the ideals of neutrality and loyalty come into conflict.

Importantly for the present purposes, these cases have concerned breaches of loyalty where public servants have criticized the governments. Canadian public service jurisprudence has not yet adequately confronted the issue of excessive loyalty or "capture" by the government of the day, which is the issue confronted in the sponsorship program setting.

A number of labour cases involving disputes between public servants and the Government followed the release of *Fraser*. An analysis of a sampling of such cases demonstrate how rarely loyalty and neutrality are in fact complementary values. One of the most significant of these cases was *Haydon v. Canada*.[58] The case concerned two scientists who spoke on national television about their concerns regarding the drug review process in Canada. They raised serious allegations, including the claim that the scientific integrity of Health Canada was undermined by the undue influence of partisan political considerations. In the Government's submissions, the two Health Canada scientists had breached their duty of loyalty to the Government. The Director of the Bureau where the two scientists worked issued a written reprimand to the scientists, emphasizing, "Your decision to pursue your outstanding complaints in a public forum is in my view in conflict with your obligations as a public servant.... Public denunciation of management is incompatible with a public servant's employment relationship."[59]

The issue for the Federal Court in *Haydon* was both whether the duty of loyalty itself violated the expressive freedom of public servants and whether the Associate Deputy Minister (ADM) of Health Canada acted reasonably in denying the scientists' grievance over the reprimand. Tremblay-Lamer J. held that the common law duty of loyalty, as articulated in *Fraser*, did not in and of itself violate the freedom of expression found in the *Charter*. She held:

> In my opinion, these exceptions [from Fraser] embrace matters of public concern. They ensure that the duty of loyalty impairs the

> freedom of expression as little as reasonably possible in order to achieve the objective of an impartial and effective public service. Where a matter is of legitimate public concern requiring a public debate, the duty of loyalty cannot be absolute to the extent of preventing public disclosure by a government official. The common law duty of loyalty does not impose unquestioning silence.[60]

Tremblay-Lamer J. further held that the onus for determining whether the criticism or disclosure in a particular case fell within the exceptions to the duty of loyalty recognized in *Fraser*, fell to the Government wishing to sanction the public servant. In other words, by upholding the reprimand in *Haydon*, the ADM was deemed to have made a finding that the exceptions from *Fraser* did not apply to the criticism by the scientists of Health Canada. Having thus framed the "*Fraser* test," Tremblay-Lamer J. concluded that the ADM committed an error in law by failing to consider the scientists' allegation of undue political pressure, which in her view clearly fell within the first exception to the duty of loyalty recognized in *Fraser*, namely, disclosure of policies that jeopardize life, health or safety of the public. Tremblay-Lamer J. also confirmed that the allegations of political interference should be raised, at first instance, through the internal supervisory structure. This is an important point to emphasize, as it addresses the concern that if all officials have constitutional duties outside the scope of ministerial responsibility, and may decline to follow instructions whenever they deem those instructions to impinge the rule of law or a non-partisan public service, the result could well be chaos. Requiring that concerns be raised internally (unless there are exceptional circumstances) means, in effect, that the boundary issues will be raised at the ADM or Deputy Minister level. In this way, neither internal discipline nor confidentiality are compromised by the public servants' constitutional duties.

The challenge of balancing loyalty with neutrality requires not only operational principles that are sensitive to political realities but also developing standards which are sufficiently flexible. Those standards must, on the one hand, provide meaningful protections to those disclosing confidences in order to uphold the public interest while, on the other hand, frustrating any attempts by partisan-motivated public servants to obstruct the Government's pursuit of its legitimate interests. As Cooke J. observed in *Alberta Union of Provincial Employees v. Alberta*, the duty of loyalty exists to ensure that government can effectively work towards legitimate goals, notwithstanding the private opinions of its public servants.[61] If the goals are not legitimate (for example, where political interference is involved), it cannot and should not be used to compel obedience from public servants.

The courts resolve the tensions implicit in the "duty of loyalty" case law by emphasizing the pursuit of balance. Whether using the *Charter* or the common law, the task of the courts remains the same, to ensure that restrictions on the ability of public servants to speak out on matters of policy and politics are informed by the legitimate expectations of government to loyalty and by the legitimate expectations of the public to impartiality and guardianship on the part of public servants. Public servants, because they exercise significant discretion in the implementation of public authority, or development and implementation of public policy, can never be simply "servants" to political "masters." They must always keep an appropriate distance, literally and figuratively, from the partisan interests of the Government. In this sense, Crown employment is not like other labour settings; the duty of loyalty among public servants is not like the ordinary duty of loyalty owed by employees to employers.

While the framework in *Fraser* provides a helpful point of departure for this balancing exercise, too often the tendency of lower courts faced with adversarial disputes between public servants and government has been to treat that framework as a "test." Rather than thoughtful reflection on, and flexible application of the principles underlying *Fraser*, the courts have contented themselves with a narrow analysis of whether the impugned activity in a given case fits within any of the exceptional categories recognized in *Fraser*. This approach leaves open how a court might respond to a public servant who fails to raise red flags where rule of law or neutrality issues arise — in other words, does *Fraser* permit public servants to criticize the Government publicly (or refuse to carry out government direction) where it is justified to do so, or does it require such action if there is no other reasonable means for the improper activity to come to light? This gap in the jurisprudence on the duty of loyalty highlights the need for an independent Public Service Commission with jurisdiction over matters of loyalty, ethics and political interference (this proposal is outlined below).

In light of the analysis above, the content of bureaucratic independence must address, at a minimum, what conditions, structures, guarantees or protections are required to ensure the political neutrality of the public service, adherence to the rule of law, and respect for the duty of loyalty. Bruce Ackerman has argued that a new separation of powers doctrine for the 21st Century must take as its point of departure the realities of the administrative state and the challenge of how a modern constitution "should be designed to insulate certain fundamental bureaucratic structures from ad hoc intervention by politicians." A primary bulwark against politicization remains the merit principle for public service hiring and promotion.[67] The integrity of the public service, however, cannot end with labour relations but must also extend to the day-to-day interaction between the political executive and the public service. In these settings, there must be an equivalent "merit" principle at stake.

Ultimately, however, the greatest guarantee against political interference is not objective in character; rather, it emanates from political will. Judicial intervention in high profile disputes is unlikely to change a culture which sees appointments of friends and partisan associates to senior public service management as a vehicle for implementing policy. Constitutional principles cannot be left entirely in the hands of the political executive or the public service to work out as they please. The courts have a role to play in resolving disputes and elaborating boundaries. The mere fact that the relationship between organs of executive government involves constitutional principles does not imply that it must be left entirely for lawyers to define, either. Bureaucratic independence engages norms of constitutional and administrative law, the political process and public administration. Only measures which resonate in all of those spheres will be effective.

3 Evaluation and Evolving Boundaries

The analysis concludes by reviewing the potential strengths and weaknesses of enhancing the independence of public servants. This requires, as I indicated above, balancing the value of independence against other important values such as accountability and the legitimate expectations of loyalty and professionalism by elected governments. There is a role for several institutions in this process, including the Auditor General, public inquiries, the courts and policy-makers. I will not focus on the development of new institutions such as the Accounting Officer model (discussed in the paper by Professor Franks) or revisiting existing institutions such as the role of ministerial responsibility, Deputy Ministers or the Clerk of the Privy Council, which are being developed in other papers. I will focus instead on a range of institutions and mechanisms which might affect the day-to-day relationship between public servants and Cabinet Ministers and which might lead to change in the culture of both spheres of executive government.

3.1
Role of Judicial Review

It is neither practical nor desirable to have public servants initiating a judicial review when they wish to question or challenge the actions of the Government. However, the development of bureaucratic independence as a constitutional norm has occurred in large part due to the Supreme Court's jurisprudence in cases such as *Fraser*. Judicial review serves at least three important roles:

- confirming and clarifying the scope of the convention on political neutrality and the rule of law;
- interpreting constitutional and statutory texts, from the *Charter* guarantees of freedom of expression and equality as applied in public service settings, to the public service acts; and,
- developing and disseminating the common law standards applicable to public servants, such as the duty of loyalty.

There are, however, significant limitations to the effectiveness of judicial review to maintain the boundary between the political and public service spheres. First, judicial review occurs only subsequent to the events in question, often many years after those events. Second, the evidence which forms the basis for the decision may be quite limited, due to Cabinet privileges as well as solicitor-client privilege. Third, judicial review is too cumbersome and expensive to handle any degree of volume. Issues of legal representation and cost may also compromise access to judicial review.

Finally and most significantly, it is not clear that public servants would have standing to bring a freestanding legal action based on political interference or improper political conduct. Would this be a public action for declaratory remedies? Could it form the basis of a claim for damages? Assuming it is a judicial review in the administrative law sense, again the remedy is unclear—would it be a declaration of invalidity, or quashing a decision? Could violation of the "statement of values" be referred to a court?

Where judicial review has played a role in the elaboration of the political executive/public service relationship to this point, is in settings of labour relations disputes (usually with employee grievances following departmental sanctions). This is not an ideal environment for the interpretation of the constitutional duties of public servants. A specialized body with a broader supervisory mandate over the day-to-day activities of public servants would be preferable as a body to interpret at first instance the duties of public servants.

3.2

Role of the Auditor General

Unlike courts, which must wait passively for cases to be brought before them, the Auditor General of Canada and the provincial Auditors General provide an important source of proactive accountability for government activities. This oversight extends to the relationship between the political executive and the public service. Because the Auditor General is a parliamentary office, and operates at arm's length from the executive branch, it is well-placed to monitor the relationship between the political executive and the public service in relation to specific programs, departments or divisions.

The Auditor General, however, cannot enforce the legal boundaries which shape public service action—its only remedial authority is a reporting requirement to Parliament (which itself can be potentially manipulated by the timing of parliamentary sittings). Further, while an Auditor General, as in the case of the review of the Sponsorship Program, may uncover incidents of rules being broken or procedures being ignored, the Auditor General's mandate does not extend to exploring the root causes of such problems.

3.3

Role of Parliamentary Committees

One of the few bodies aside from the courts with the legitimacy to hold accountable Cabinet Ministers and to confer legitimacy on bureaucratic independence, is Parliament. Parliamentary committees may open a door, in turn, to greater accountability concerning the actions both of senior public servants and Ministers. The first investigation into the Sponsorship Affair in 2004, following the Auditor General's 2003 Report, was undertaken by a parliamentary committee, and this served to demonstrate the limitations of the existing parliamentary committee system. The committees have extraordinarily few resources to draw upon to conduct effective investigations and are beset by partisanship. Several commissions and reviews already have called for a more robust parliamentary committee system and a greater capacity of Parliament to hold the government of the day accountable, but progress has been slow and incremental at best.[63]

In its 10th Report, the Public Accounts Committee issued a set of unusually activist recommendations which, even more unusually, enjoyed multi-party support on the Committee. The report, *inter alia*, recommended that Canada adopt an Accounting Officer model akin to that of the UK, under which Deputy Ministers are directly and personally accountable to Parliament for the overall organization, management and staffing of the department and for department-wide procedures in financial matters.[64] The Government's response to the 10th Report rejected the Accounting Officer model and contained the following key assertion:

> The report conveys the general impression that there is ambiguity in the current system; however, there is no ambiguity with regard to the assignment of accountability—ministers are responsible for and accountable to Parliament for the overall management and direction of their departments, whether pertaining to policy or administration and whether actions are taken by ministers personally or by unelected officials under ministers' authority or under authorities vested in them directly.
>
> Nor is there ambiguity in the accountabilities of deputy ministers. Deputy Ministers are accountable to their ministers (and ultimately, through the Clerk of the Privy Council, to the Prime Minister) for

> the discharge of their responsibilities, as outlined in legislation or in management policies approved by the Treasury Board. Even when senior officials support the accountability of ministers by providing information publicly, such as when appearing before parliamentary committees, they do so, on behalf of their ministers. These officials are answerable to Parliament in that they have a duty to inform and explain. They do not have direct accountability to Parliament and may neither commit to a course of action (which would require a decision from ministers) nor be subjected to the personal consequences that parliamentarians may mete out.

As indicated above, I disagree with the characterization of public service accountability as entirely subsumed within ministerial responsibility. Based on my analysis, there are no constitutional impediments which preclude Deputy Ministers from being accountable directly to Parliament through the committee system. Further, some constitutional principles suggest such accountability may be desirable. There are two such principles I have highlighted (accountability for the maintenance of a non-partisan public service, and accountability for adherence to the rule of law). In both these settings, when Deputy Ministers (and ultimately the Clerk of the Privy Council) may be called before parliamentary committees to account for the conduct of public servants (and their own conduct), they speak to Parliament as the leadership of the public service, a distinct "organ of government" with a voice independent from their Ministers.

3.4

Role of Public Inquiries

While this may be the most obvious point raised in the paper (in light of the attention which this Commission has focused on the issue of political interference and the frailty of the non-partisan public service), it is important not to lose sight of the role of public inquiries in exploring, elaborating and developing the legal boundaries between public servants and the political executive.

While inquiries do not make findings of law and in this sense are distinct from courts, they may offer analyses of policies, practices, institutions and procedures in their fact-finding or recommending roles, and in that sense may go further than courts in serving as a catalyst for change and reform. In addition to the Sponsorship Inquiry, the Arar Inquiry and the Ipperwash Inquiry, all currently underway, are investigating, *inter alia*, allegations of political interference or a lack of impartiality in the actions of public servants.

3.5

Role of Public Service Commissions

While the courts clearly perform a critical role in establishing and elaborating the boundaries between political and public service spheres, they are not ideal institutions to deal with monitoring or refining those boundaries. This may well better fit the flexibility and specialized expertise of a commission or tribunal. Most Canadian jurisdictions in fact have public service commissions of one kind or another, but their mandates do not extend to governing the relationship between Cabinet Ministers and public servants.

As part of the federal government's modernization of the public service governance, the Canadian Public Service Commission will become in December 2005 an independent institution which reports to Parliament. Section 23 of the *Public Service Employment Act*, scheduled to come into force at the end of 2005, provides that the Commission's reports be tabled in Parliament:

> (1) The Commission shall, as soon as possible after the end of each fiscal year, prepare and transmit to the minister designated by the Governor in Council for the purposes of this section a report for that fiscal year in respect of matters under its jurisdiction.

(2) The minister to whom the report is transmitted shall cause the report to be laid before each House of Parliament within the first fifteen days on which that House is sitting after the minister receives it.

(3) The Commission may, at any time, make a *special report to Parliament* referring to and commenting on any matter within the scope of the powers and functions of the Commission where, in the opinion of the Commission, the matter is of such urgency or importance that a report on it should not be deferred until the time provided for transmission of the next annual report of the Commission.

Further reinforcing the independence of the Public Service Commission is the fact that Parliament will approve the appointment of the President of the Commission and that Presidents will serve for fixed seven-year terms.

Protecting the political impartiality of the public service is one of the core missions of the Commission under its new empowering legislation. The Public Service Commission has multiple mandates, which include the development of policy, investigation, auditing, adjudicating and remedial measures (including ordering the termination of a public servant's employment).[65]

However, the scope of the Commission's power in relation to the non-partiality of the public service is limited in at least two key areas. First, the Commission is concerned with narrowly party-related political activity. This would catch activities by public servants to advance the interests of the Liberal Party of Canada, as occurred in relation to the Sponsorship Program, but not activities designed to advance a particular political cause (for example, separatism in Quebec) but unrelated to a particular party. Second, the Commission's role in relation to political activities relates primarily to oversight over public servants who wish to run for office or become involved in political campaigns. The Commission is not designed to monitor and enforce protections against political interference on a day-to-day basis (the one exception to this is in the field of staffing,where the Commission plays a key role in ensuring that staffing decisions are made without partisan manipulation). There is also some question as to the sufficiency of the Commission's resources and its capacity to obtain the resources it would need, should it seek to fulfill a broader mandate. In this regard, it may be advisable to clarify one of the Commission's most important powers, which is to act as a Commission of Inquiry with all the necessary powers under the *Inquiries Act*, where necessary.[66]

Another potential limitation to the independence of the Commission is its reliance on Department of Justice lawyers for legal advice. Again, as in the case of independent legal advice to the Clerk of the Privy Council on matters of the constitutional duties of public servants, it may be necessary for the Commission to stake out a position that is at odds with the government of the day (this is especially the case where the Commission intervenes before the administrative tribunal overseeing labour disputes with public servants).

This raises a crucial dilemma—who has the last word when it comes to the nature and scope of public service duties under the Constitution? The Attorney General must have the last word for the Government on matters of constitutional propriety (and must resign if the Cabinet rejects her or his advice). If it is not for the Attorney General to speak for the Public Service Commission (or the Clerk of the Privy Council), then whose view prevails where there is a conflict between the constitutional position of the political executive and the position of the public service? And, further, what if there is a conflict between the Clerk and the President of the Commission in this regard? Resolving this dilemma in part relates to reforms to the Clerk of the Privy Council's mandate and the protections against politicized appointments to this position.[67] Since the role of the Clerk is to represent the public service to government, I would suggest it cannot also be to represent the Government to the public service. This potential conflict between voices articulating constitutional and legal boundaries between political and public service spheres will be complicated still further if and when new whistleblower legislation is enacted which would create yet another body with authority over the interface between political and public service spheres.

This dilemma goes to the core propositions of this paper—first, that the public service does have its own independent constitutional duties and responsibilities for which ministerial responsibility is inappropriate (as those duties relate directly to checks on ministerial power), and second, that in light of the independent nature of these duties, they must be subject to independent oversight, vested in a body beyond government control. While this remains a critical area of constitutional propriety to resolve, it may be prudent simply to provide for a reference power to the Federal Court to provide guidance where potential conflicts emerge.

Whatever the scope of the Public Service Commission to oversee the relationship between the political executive and the public service, it should have a primary role in elaborating the standards to which public servants should comply. Those standards, as suggested above in relation to *Fraser*, may be found to some extent in case law, but more specifically are set out in legislation and guidelines. It is to the other sources of such standards that I now turn.

3.6

Civil Service Codes and the Role of Soft Law

The question of who has carriage of overseeing the political/public service relationship dovetails with the question of the source of the standards and boundaries which govern this relationship. I have suggested that constitutional norms and principles provide an important and too often overlooked source for these standards and boundaries. The need for clarity and consistency, however, makes codifying these standards and boundaries desirable. This is the function and aspiration of civil service codes and statements of civil service ethics and values.

While civil service codes can be legislative in nature,[68] they may also come in the form of non-legislative codes, guidelines and statements of values. Guidelines and codes are a species of what is sometimes termed "quasi-legislation,"[69] or "soft law."[70] The distinction between legislative and non-legislative instruments is significant, as legislative codes have been held to be "binding" and enforceable, while codes and guidelines, developed by and for the executive, are "non-binding."

Ethical codes and policy guidelines vary across different political and bureaucratic settings. While non-binding, these codes can nevertheless provide important guidance and can help to shape the ethos and administrative culture of the public service. For example, because ministerial responsibility is an unwritten constitutional principle, it might be subject to varying interpretations. The Privy Council Office's (PCO) guideline, entitled *Governing Responsibly: A Guide for Ministers and Ministers of State*, commits the Government to a particular interpretation (even if unenforceable in the courts).[71] These instruments are sometimes developed in response to external pressures and sometimes due to internal initiative. Still other bureaucratic settings have no code of ethics or policy guidelines at all. This *ad hoc* development of codes and guidelines calls into question their ability to ensure the accountability, coherence and fairness of public administration governance.[72]

Codes of ethics typically set out conduct under which conflicts of interest are prohibited, based on pecuniary or associational conflicts of interest, and identify circumstances in which a public official must disclose certain information, or take certain remedial steps to prevent a prohibited conflict from arising.[73] For example, the U.K. *Civil Service Code* includes the following provisions:

(1) The constitutional and practical role of the Civil Service is, with integrity, honesty, impartiality and objectivity, to assist the duly constituted Government of the United Kingdom, the Scottish Executive or the National Assembly for Wales constituted in accordance with the Scotland and Government of Wales Acts 1998, whatever their political complexion, in formulating their policies, carrying out decisions and in administering public services for which they are responsible.

(2) Civil servants are servants of the Crown. Constitutionally, all the Administrations form part of the Crown and, subject to the provisions of this Code, civil servants owe their loyalty to the Administrations in which they serve.

(3) This Code should be seen in the context of the duties and responsibilities set out for UK Ministers in the Ministerial Code, or in equivalent documents drawn up for Ministers of the Scottish Executive or for the National Assembly for Wales, which include:

- accountability to Parliament or, for Assembly Secretaries, to the National Assembly;
- the duty to give Parliament or the Assembly and the public as full information as possible about their policies, decisions and actions, and not to deceive or knowingly mislead them;
- the duty not to use public resources for party political purposes, to uphold the political impartiality of the Civil Service, and not to ask civil servants to act in any way which would conflict with the Civil Service Code;
- the duty to give fair consideration and due weight to informed and impartial advice from civil servants, as well as to other considerations and advice, in reaching decisions; and,
- the duty to comply with the law, including international law and treaty obligations, and to uphold the administration of justice.

> (11) Where a civil servant believes he or she is being required to act in a way which:
>
> - is illegal, improper, or unethical;
> - is in breach of constitutional convention or a professional code;
> - may involve possible maladministration; or,
> - is otherwise inconsistent with this Code;
>
> …he or she should report the matter in accordance with procedures laid down in the appropriate guidance or rules of conduct for their department or Administration. A civil servant should also report to the appropriate authorities evidence of criminal or unlawful activity by others and may also report in accordance with the relevant procedures if he or she becomes aware of other breaches of this Code or is required to act in a way which, for him or her, raises a fundamental issue of conscience.
>
> (12) Where a civil servant has reported a matter covered in paragraph 11 in accordance with the relevant procedures and believes that the response does not represent a reasonable response to the grounds of his or her concern, he or she may report the matter in writing to the Office of the Civil Service Commissioners….

In Canada, by contrast, the federal civil service is governed by a "Values and Ethics Code for the Public Service," which includes, in addition to a statement of values and ethics for the civil service, conflict of interest guidelines, guidelines as to post-employment restrictions and a section entitled "Avenues of Resolution." This section provides:

> Any public servant who wants to raise, discuss and clarify issues related to this Code should first talk with his or her manager or contact the senior official designated by the Deputy Head under the provisions of this Code, according to the procedures and conditions established by the Deputy Head.

> Any public servant who witnesses or has knowledge of wrongdoing in the workplace may refer the matter for resolution, in confidence and without fear of reprisal, to the Senior Officer designated for the purpose by the Deputy Head under the provisions of the *Policy on the Internal Disclosure of Information Concerning Wrongdoing in the Workplace.*
>
> Furthermore, any public servant who believes that he or she is being asked to act in a way that is inconsistent with the values and ethics set out in Chapter 1 of this Code can report the matter in confidence and without fear of reprisal to the Senior Officer, as described above.
>
> If the matter is not appropriately addressed at this level, or the public servant has reason to believe it could not be disclosed in confidence within the organization, it may then be referred to the Public Service Integrity Officer, in accordance with the *Policy on the Internal Disclosure of Information Concerning Wrongdoing in the Workplace.*
>
> It is expected that most matters arising from the application of this Code can and should be resolved at the organizational level.[74]

There is significant room for this Code to be strengthened in at least two areas. First, the Code should clearly set out that political interference in the impartiality of public service decision-making is unacceptable, and second, the Code should set out express constraints over the activities of ministerial and exempt staff.

While "soft law" may all fall into a "non-binding" category, the form and content of these codes sends signals of varying strength to those affected. The UK *Civil Service Code*, because it is legislative and because it expressly invites civil servants to report political interference or incidents of instructions which are improper, illegal or unethical or which may lead to "maladministration," arguably sends a stronger message than the

Canadian "Statement of Values and Ethics." Even more important, the UK civil servant who remains dissatisfied by the response from his or her department may refer the matter to the Civil Service Commission, a recourse not provided by the Canadian statement.[75] However, revealingly, the introduction of the Code, while hailed as "Whitehall's Cultural Revolution,"[76] has in fact produced remarkably little change. Only six complaints have been forwarded to the Civil Service Commissioners in the seven years the Code has been in operation and, according to the head of the Civil Service Commission for the U.K., "the *Code* has not seeped into the culture—it has not changed the way people behave or respond."[77] This is an important cautionary tale. An important aspect of the Sponsorship Inquiry's Phase I Report, while paying tribute to the ideals which generally govern the public service, revealed the troubling consequences of a culture permeable to political interference.

Civil service codes, in my view, should be entrenched in legislative form to indicate both the gravity of the issues dealt with under the Code and to establish Parliament's imprimatur on its provisions (and in this respect, it is important that such a Code be approved by all parties in Parliament if at all practicable).

3.7

Treasury Board & Privy Council Office

The two governmental settings with a mandate covering the relationship between public service and political spheres are Treasury Board and the PCO, headed by the Clerk of the Privy Council. Both these departments played a key role in the Sponsorship Program.[78]

I have already referred to the importance of the Clerk of the Privy Council Office on several occasions in this paper. As the representative of the public service to the government of the day, the Clerk plays a key role in operationalizing the boundaries between the public service and the political executive described above. The role of the Clerk in acknowledging the accountability for the Sponsorship Program with the Prime Minister is outlined in the Sponsorship Inquiry's Phase 1 report.[79] Ms. Bourgon, former Clerk of the Privy Council, is credited with repeatedly warning the Prime Minister about the difficulties of his taking personal responsibility for the sponsorship fund. I believe, however, that if the recommendations I have supported were adopted, a Clerk of the Privy Council would have to go further, and ascertain that the sponsorship fund was not being run outside the rule of law, before permitting public service personnel and resources to be deployed to support the management of this fund.

In addition to its role in safeguarding the integrity of the public service, the PCO is particularly important as a source of information and advice for ministers. I believe it may also be appropriate to take a lead role in elaborating the standards and guidelines applicable to political staff (especially if, as recommended in this paper, they are made no longer exempt from public and enforceable standards of conduct).

Treasury Board, as the nominal employer of the public service, clearly plays a crucial role in the clarification and recognition of public servants' constitutional duties. Treasury Board sets the standards, policies and practices which govern civil service conduct, particularly in relation to oversight of financial activities. Based on the testimony before the Sponsorship Inquiry, the Commissioner concluded, "The Commission is left with the impression that Treasury Board no longer considers its oversight function to be an important part of its overall responsibilities."[80]

Treasury Board has been the primary locus of reform following the 2003 Auditor General's Report. This response has included several initiatives to tighten reporting and accountability requirements for departmental managers.[81] At a recent appearance before the Public Accounts Committee, the Minister responsible for Treasury Board, the Honourable Reg Alcock, summarized this activity in the following terms:

> The current Prime Minister came in with a very clear set of objectives at the time of transition, one of which was to reinforce Treasury Board's role as the central management agency of government, and to have it strengthen its internal oversight capabilities. Along with that, I had direct instruction from the Prime Minister to recreate the position of controller general. Rather than review all of that activity, though, I want to make one point at the outset, which is that management change, change in any large organization is a process, as opposed to a series of one or two major decisions.
>
> I have undertaken, over the course of the last 18, 19 months, a series of almost, I think, 158 separate decisions that affect the management of government that have been done by myself and my colleagues in PCO and government services, and have resisted the normal course of putting down a big plan, the grand design, because I felt that we were far better served, and citizens are far better served, and the public service was far better served by simply addressing problems, moving step by step to improve the systems.
>
> On Friday, I made several more announcements on the management agenda, an area that we had flagged early on and had done some work on in the Crown's report was this issue of internal audit. I had made announcements almost a year ago of an intention to move to a new, more vigorous form of internal audit. I was able to announce on Friday, the completion of that policy, which has been adopted by Treasury Board and is now part of the internal management structure of government. We have other work to do on the senior financial officers that the controller general is working on now.[82]

The responses of Treasury Board to strengthening oversight lie beyond the scope of this paper, but to the extent that this has included reviewing the accountability of Ministers and senior public servants, as observed in the introduction above, the view of Treasury Board is in my view unduly narrow and fails to appreciate the independent constitutional duties of the public service.

3.8
Role of Training and Learning

Training and education clearly are the cornerstones to building a new and vigorous administrative culture for the public service in which political/public service boundaries and the commitment of the public service to uphold the rule of law figure prominently.

In conducting interviews for a study on bureaucratic independence, I interviewed a number of Directors, ADMs and DMs with respect to how newly-hired public servants learned the boundaries between the public service and political staff and Ministers. Most of the answers indicate that this is left to "osmosis" and "mentorship" and "learning by example," but virtually no formal instruction or training of any kind specifically addressed these issues. This situation must change.

A revamped Public Service Code and strengthened Public Service Commission could and should provide a catalyst for more training (both formal and informal) dedicated to disseminating information about the boundaries between the political executive and the public service.

4 Conclusions

In this paper, I have attempted to demonstrate that constitutional and legal boundaries do exist and form part of the foundation of the Westminster model of Parliamentary democracy. Further, I have emphasized that these boundaries are dynamic and contextually determined "lines in the sand." While these boundaries are constitutional in origin, I have argued that they must develop, through interpretation by public service commissions and public service codes, not simply by judges interpreting constitutional conventions and common law principles. If real change is to occur, it must involve an integrated and concerted effort to re-orient public service culture. Such an initiative cannot, however, be limited to the public service. It is the relationship between the political executive and the public service which must move forward, and do so on the basis of mutual respect and a shared commitment to the rule of law, the Convention of a non-partisan public service, and accountability for the exercise of public authority.

In this paper, I have suggested a basis for some modest recommendations. These include:

- *recognition on the part of government of the independent constitutional duties of the public service and, operationally, the accountability of Deputy Ministers and the Clerk of the Privy Council for the integrity of the public service (separate research papers for the Inquiry explore the role of the Deputies and Clerk in more detail);*

- *a revision of the Code of Values and Ethics for the Public Service into a legislative Public Service Code, which would include an articulation of the responsibility of civil servants to remain non-partisan and resist political interference. The Code would, in effect, give statutory expression to the Constitutional Convention of a non-partisan public service. Such a code could clarify the dual obligations of loyalty owed by public servants to the Crown and to the government of the day. The Code would also set out expressly the role and responsibilities of public servants in relation to political staff (referred to presently as exempt staff). Disputes over the interpretations of the Code and disputes relating to alleged breaches of the Code would, at first instance, be referred to the Commission. The Commission should also take a leading role in initiating investigations and inquiries into matters of concern relating to the integrity of the public service; and,*

- *clarifying and strengthening the role of Parliament in relation to the accountability of the public service. The restructuring of the Public Service Commission to become a Parliamentary office is a positive reform, as would*

> *be adopting the Accounting Officer model as recommended by the 10th Report of the Public Accounts Committee. Whether or not this model is adopted, I have suggested that the leadership of the public service (the Clerk of the Privy Council, the President of the Commission, etc.) remain accountable for decisions which impinge on the non-partisan activities of the public service and decisions which relate to compliance with the rule of law. These are matters necessarily outside the scope and competence of ministerial responsibility. Further, this relationship of accountability in no way undermines ministerial responsibility over all matters of policy and the political decision-making of the Government, nor does it compromise the duty of loyalty owed by public servants to the Government.*

To be clear, I do not believe that either an enhanced Public Service Commission or a legislative Public Service Code would have necessarily prevented the Sponsorship Affair from occurring, nor that a more robust Clerk of the Privy Council or parliamentary committees with greater capacity could have averted the scandal. The Sponsorship Inquiry arising out of that scandal, however, now provides a catalyst for addressing the more structural problems relating to the failure of key public servants and the political executive to understand and respect the legal and constitutional boundaries which define their duties and their accountabilities. If we are to address these problems effectively, we must adopt strategies capable of shifting political and administrative culture from a culture of secrecy and intimidation to a rule of law-oriented culture. The search for boundaries is not a threat to Canada's Westminster system of parliamentary democracy; rather, it is a means of fulfilling the promise of this system, and of ensuring that improper partisan interests do not frustrate the integrity of the Crown or the public interest.

Endnotes

[1] Some of the arguments and approaches in this paper are developed from L. Sossin, "Speaking Truth to Power? The Search for Bureaucratic Independence" (2005) 55 University of Toronto Law Journal 1. I am grateful to Jamie Liew and Erica Zarkovich, both now students-at-law at Borden Ladner Gervais, for their superb research assistance.

[2] D. Savoie, *Breaking the Bargain: Public Servants, Ministers and Parliament* (Toronto: University of Toronto Press, 2003), pp. 4-16. Savoie elaborates, "In the absence of formal rules, politicians and public servants some time ago struck a 'bargain'… Under the arrangement, public servants exchanged overt partisanship, some political rights and a public profile in return for permanent careers, or at least indefinite tenure, anonymity, selection by merit, a regular work week, and the promise of being looked after at the end of a career…. Politicians meanwhile exchanged the ability to appoint or dismiss public servants and change their working conditions at will for professional competence and non-partisan obedience to the government of the day" (pp. 5-6).

[3] Http://www.tbs-sct.gc.ca/report/rev-exa/ar-er_e.rtf.

[4] Ibid., p. 13.

[5] The culture of "fear and intimidation" which led to egregious political interference in the operation of the sponsorship program is now documented in detail in the first report of this Commission. See *Who is Responsible: Phase 1 Report* at http://www.gomery.ca/en/phase1report/ (hereinafter "Phase I Report").

[6] According to Kenneth Kernaghan and John Langford, "Political neutrality is a constitutional convention which provides that public servants should avoid activities likely to impair, or seem to impair, their political impartiality or the political impartiality of the public service…." See K. Kernaghan and J. Langford, *The Responsible Public Servant* (Halifax and Toronto): IRPP and IPAC, 1990), p. 56; and D. Siegel, "Politics, Politicians, and Public Servants in Non-Partisan Local Governments," Canadian Public Administration (1986), pp. 1-30. See also J.E. Hodgetts, *The Canadian Public Service: A Physiology of Government* (Toronto: University of Toronto Press, 1973), p. 89.

[7] This list is reproduced in K. Kernaghan, "The Future Role of a Professional Non-Partisan Public Service in Ontario," Panel on the Role of Government Paper, Research Paper series (2003), p. 11; and K. Kernaghan, "East Block and Westminster: Conventions, Values, and Public Service," in C. Dunn, ed., *The Handbook of Canadian Public Administration* (Don Mills: Oxford University Press, 2002), 104, 106. See also K. Kernaghan, "Political Rights and Political Neutrality: Finding the Balance Point" (1986) 29 Canadian Public Administration 639. It was accepted as part of the expert testimony in *Osborne v. Canada*, infra, among other cases.

[8] E. Stewart, *Cabinet Government in Ontario: A View from the Inside* (Halifax: IRPP, 1989), p. 49, quoted in ibid at pp. 12-13. See also C. Dunn, "The Central Executive in Canadian Government: Searching for the Holy Grail" in C. Dunn (ed.), *The Oxford Handbook of Canadian Public Administration* (Toronto: Oxford, 2002), pp. 305-340.

[9] While the jurisprudence on bureaucratic neutrality is significant, it is worth highlighting that this issue is typically secondary to the actual dispute at hand. The actual dispute is more likely to be a labour issue involving either an individual sanction being grieved or a dispute between a public sector union and the government. This is even more apparent in cases elucidating the duty of civil service loyalty to the government of the day, as discussed below.

[10] [1987] 2 S.C.R. 2.

Ibid., at para. 85.

G. Marshall, *Constitutional Conventions* (Oxford: Oxford University Press, 1984), p. 210.

The constitutional texts also say nothing of the obligation of Ministers to resign in the face of maladministration or the obligation of Ministers to defend the actions of their ministries to Parliament, but these are nonetheless core requirements of Canada's constitutional democracy. As Andrew Heard has observed, "The principles of individual and collective ministerial responsibility take form mostly in the informal rules that have arisen to modify the positive legal framework of the constitution. The importance of these rules of responsible government cannot be overstated; without them the nature of our system of government would be fundamentally transformed": A. Heard, *Canadian Constitutional Conventions: The Marriage of Law and Politics* (Toronto: Oxford University Press, 1991), p. 48.

Wade, H.W.R. and C.F. Forsyth. *Administrative Law* (Oxford: Oxford University Press, 2000), p. 29.

Ibid. He cites as illustration the comments of Brenda Elliot, a former Environment Minister under the Tories in Ontario who testified at the Walkerton Inquiry in June 2001 and replied when asked about her responsibility as Minister for the actions of the ministry, "Well, we're now into a very complex discussion about responsibility, which ...has been debated for centuries as part of the Westminster Parliamentary tradition" (quoted at p. 4). Kernaghan also canvasses the various jurisdictions which do attempt to spell out the requirements of ministerial responsibility and the distinction between an official being "answerable" and "accountable" for her or his actions (at pp. 4-11).

See S. Sutherland, "Responsible Government and Ministerial Responsibility: Every Reform Is Its Own Problem" (1991) 24 Canadian Journal of Political Science. See also Ontario Law Reform Commission, "Report on Political Activity, Public Comment and Disclosure by Crown Employees" (Toronto: Ministry of the Attorney General, 1986), p. 22; and Sir Richard Scott, "Ministerial Responsibility" [1996] Public Law 410.

Anson, Vol. II, Part 2, of *Law and Custom of the Constitution* (1908), p. 69, cited by MacKinnon ACJO in his judgment in *OPSEU*, quoted in the Supreme Court's reasons in that case, at para. 96. See also D. Savoie, *Thatcher, Reagan, Mulroney: In Search of a New Bureaucracy* (Toronto: University of Toronto Press, 1994), at pp. 44-86.

See D. Smith. *The Invisible Crown: The First Principle of Canadian Government* (Toronto: University of Toronto Press, 1995). Smith observes, "Notwithstanding the decline of political patronage in the ranks of the civil service, the appointment principle continues to flourish at the deputy minister level and in the multitude of administrative tribunals, boards and commissions created by the federal and provincial governments" (102).

Under the NDP in Ontario, for example, David Agnew, a senior political adviser with no administrative experience, was appointed Secretary of Cabinet, the head of the Ontario Public Service. This appointment was chronicled in P. Monahan. *Storming the Pink Palace* (Toronto: Lester, 1995) at pp. 37-48. See also the discussion of the politicization of appointments to lead federal civil service in the 1970s in T. Axworthy, "Of Secretaries to Princes" (1988) 31 Canadian Public Administration, p. 247.

Kernaghan, "The Future Role of a Professional Non-Partisan Public Service in Ontario" supra, at pp. 20-21.

OPSEU, at para. 99.

This distinction was established by the Supreme Court in *Reference re Amendment of the Constitution of Canada* (1981), 125 D.L.R. (3d) 1 at pp. 84-85. For discussion, see E. Forsey, "The Courts and the Conventions of the Constitution" (1984) 33 UNB LJ 1; A. Heard, *Canadian Constitutional Conventions: The Marriage of Law and Politics* (Toronto: Oxford University Press, 1991), pp. 1-15; and L. Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada* (Toronto: Carswell, 1999), pp. 172-77. In *Osborne*, discussed below, the Court stated, "Therefore, while conventions form part of the Constitution of this country in the broader political sense, i.e. the democratic principles underlying our political system and the elements which constitute the relationships between the various levels and organs of government, they are not enforceable in a court of law unless they are incorporated into legislation. Furthermore, statutes embodying constitutional conventions do not automatically become entrenched to become part of the constitutional law, but retain their status as ordinary statutes. If that were not the case, any legislation which may be said to embrace a constitutional convention would have the effect of an amendment to the Constitution…" at p. 87.

For the most prominent example of this phenomenon, see *Secession Reference* [1998] 2 S.C.R. 217. For discussion, see J. Leclair, "Canada's Unfathomable Unwritten Constitutional Principles" (2002) 27 Queen's L.J. 389 at 407. Leclair, like most observers, does not expressly distinguish between constitutional conventions and the broader category of underlying constitutional principles. Those who favour greater judicial involvement in enforcing these principles point to the Court's reference in *Secession Reference* to constitutional principles giving rise to "substantive legal obligations." See also M. Walters, "The Common Law Constitution in Canada: Return of *Lex non Scripta* as Fundamental Law" (2001) 51 U.T.L.J. 91 and W. Newman, "Grand Entrance Hall, Back Door or Foundation Stone? The Role of Constitutional Principles in Construing and Applying the Constitution of Canada" (2001), 14 Supreme Court Law Review (2d) 197; and J. Cameron, "The Written Word and the Constitution's 'Vital Unstated Assumptions'" (forthcoming in *Essays in Honour of Gerald A. Beaudoin*).

[1985] 2 S.C.R. 455 [hereinafter "*Fraser*"].

Ibid., at p. 458.

Ibid., at p. 466.

Ibid., at p. 470. The duty of loyalty is discussed below. Like the requirement of political neutrality, this duty does not appear to have an express foundation in the written Constitution but arguably is implied. Dickson C.J. simply declared that the public interest in impartiality "dictates a general requirement of loyalty on the part of the public servant," at p. 456.

Ibid., at p. 471.

Ibid.

The issue of whistleblowers and to what protection they are legally entitled is beyond the scope of this paper, but is canvassed in Sossin, "Speaking Truth to Power," supra.

See Federal Court of Appeal's reasons in *Osborne v. Canada*.

Osborne v. Canada [1991] 2 S.C.R. 69 at 88. Sopinka J. rejected the government's argument that s. 33 of the *Public Service Act* was immune from *Charter* scrutiny because it codified a constitutional convention, but did observe that the fact a provision reflects this convention "is an important consideration in determining whether in s. 33, Parliament was seeking to achieve an important political objective."

Fraser, supra.

OPSEU, supra, at para. 93.

L. Sossin, "The Ambivalence of Executive Power in Canada" in Adam Tomkins and Paul Craig (eds.), *The Executive and Public Law: Power and Accountability in Comparative Perspective* (Oxford: Oxford University Press, forthcoming) (on file with author).

Roncarelli v. Duplessis, [1959] S.C.R. 121 at 142. In that case, Rand J. stated that "there is always a perspective within which a statute is intended to operate" (at 140). In other words, every grant of statutory authority has an implied limitation which restricts its exercise to proper and not improper purposes, in good faith and not in bad faith, and based on reasoned and not arbitrary or discriminatory factors. For discussion, see D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf ed.), at para. 13:1221.

See *British Columbia v. Imperial Tobacco Canada Ltd.* 2005 SCC 49 at paras. 57-68. For recent appraisals, see P. Hogg, and C. Zwibel, "The Rule of Law in the Supreme Court of Canada" (2005), 55 U.T.L.J. 715 and W. J. Newman, "The Principles of the Rule of Law and Parliamentary Sovereignty in Constitutional Theory and Litigation" (2005), 16 N.J.C.L. 175.

See *Baker* at paras. 53, 56.

Secession Reference, supra, at para. 70.

See *Crevier v. Quebec*, [1981] 2 S.C.R. 220. See also M. Elliot, *The Constitutional Foundations of Judicial Review* (Oxford: Hart Publishing, 2001).

As Chief Law Officer of the Crown, the Attorney General is responsible for ensuring "that the administration of public affairs is in accordance with law." M. Freiman, "Convergence of Law and Policy and the Role of the Attorney General" (2002) 16 Supreme Court Law Review (2nd) 335 at 338-339.

David Dyzenhaus has written that the rule of law, as part of Canada's common law constitution, entitles those individuals who come into contact with administrative decision-makers to treatment in accordance with values that Canadians regard as constitutional – this may well extend to a right to administrative decision-makers who do not owe their position to political affiliation or patronage alone. See D. Dyzenhaus, "Constituting the Rule of Law: Fundamental Values in Administrative Law" (2002) 27 Queen's LJ 445 at 503, commenting on *CUPE v. Ontario (MOL)* 2003 SCC 29.

In New Zealand, for example, public servants are informed that Ministers' directions should be rejected if "it is reasonably held that instructions are unlawful because it would be unlawful for the minister to issue them ... where it would be unlawful for the officials to accept them .... where officials would have to break the law in order to carry out the directive." New Zealand, State Services Commission, The Senior Public Servant, p. 28, quoted in Kernaghan, "The Future Role of a Professional Non-Partisan Public Service in Ontario" supra, at p. 22.

[2000] F.C.J. No. 754 (T.D.).

Ibid., at para. 20.

(2001), 208 D.L.R. (4th) 577 (Ont. C.A.).

See for a discussion of the rule of law as part of civil service culture, L. Sossin "From Neutrality to Compassion: The Place of Civil Service Values and Legal Norms in the Exercise of Administrative Discretion" (2005) 55, University of Toronto Law Journal 427.

Two other opinions sought by the Government House Leader contradicted this conclusion and found that no convention requiring the announcement of a budget in the House existed.

A. Baillie, "Contempt ruling shocks PCs; Government lawyers told Tories moving budget venue was illegal" (May 9, 2003) *Toronto Star*, A7

C. Mallan, "Tory backers to provide setting for budget day" (March 22, 2003) *Toronto Star*, A6: ("Also yesterday, Liberal Leader Dalton McGuinty's chief of staff sent a letter to the province's top bureaucrat, Secretary of Cabinet Tony Dean, questioning the Conservative government's use of non-partisan public servants in the release of what he termed a plan that is "clearly partisan in nature." Philip Dewan asked Dean to prevent civil servants from being drawn into a political exercise. "I believe the leadership of the OPS (Ontario Public Service) has an obligation to ensure that... Ontario's dedicated and professional public servants are not placed in the compromising circumstance of assisting with preparations for a partisan event.")

This is attested to by the conflicting constitutional opinions produced by the Speaker of the Legislature and the Tory Government House Leader, which are on file with the author (the opinion produced by the Attorney General, if there was one, was never released).

The last chapter in the Magna Budget affair ended in a courtroom – following the delivery of the budget, a court application was brought by a citizen seeking a declaration from the court that the delivery of the budget outside the Legislature violated parliamentary conventions. The suit was dismissed on a preliminary motion on justiciability grounds. See *Martin v. Ontario* (decision of Superior Court of Ontario, released January 20, 2004).

OLRC Report, supra, at p. 34.

C.K. Allen, *Laws and Orders* (3rd ed.) (1965), pp. 281-282.

Fraser, supra. at p. 471.

Ibid., at p. 470.

This was characterized by the Ontario Law Reform Commission as a functional approach to loyalty, in which "Loyalty is necessary to the effective operation of the public service, and the effective operation of the public service is a constitutional imperative that legitimizes some limitation on the individual rights of public servants." Supra note 54, at p. 47-48.

[2001] 2 F.C. 82 (F.C.T.D.). This litigation continues. For the most recent decision confirming that the standard of review of grievance adjudicators is reasonableness and that the adjudicator's finding against Ms. Haydon was reasonable, see [2005] FCA 249.

Ibid., at para. 32.

Ibid.

[2000] A.J. 1046 (Q.B.), at para. 40 (reversed on appeal [2002] A.J. No. 1086 (C.A.)).

Ackerman, supra, at p. 692.

The best known of these is the 1979 Lambert Commission.

For a detailed and favourable appraisal of this model, see C.E.S. Franks, "The British Accounting Officer System" (research paper prepared for the Sponsorship Inquiry).

See Public Service Commission's submission to this Inquiry. See also its last annual report at http://www.psc-cfp.gc.ca/centres/annual-annuel/index_e.htm.

For discussion of these powers, see *Tucci v. Canada (Attorney General)*, 126 F.T.R. 147.

While it is beyond the scope of this paper, I have argued elsewhere that the Clerk should not be a political appointment. I would go further and also question the propriety of Deputy Ministers being appointed by the Prime Minister. The system in the UK, whereby the head of the Civil Service Commission chairs selection committees for Deputy Ministers to ensure they are non-partisan appointments has much to commend it as a practice in keeping with the constitutional values advanced in this analysis.

See the UK Civil Service Code at
http://www.publications.parliament.uk/pa/cm200405/cmselect/cmpubadm/336/33603.htm#a6.

See G. Ganz, *Quasi-Legislation: Recent Developments in Secondary Legislation* (London: Sweet & Maxwell, 1987) at pp. 16-22.

The relationship between "soft" law in the form of guidelines, codes, rules, directives, as well as established policies and practices, and "hard" law in the form of statutes and regulations is analogous to the relationship between hardware and software in computers. Hardware provides the infrastructure which is uniform to all users while software must adapt to the user and enable programs to work. This term was also adopted in the context of codes of ethics in Angela Campbell and Kathleen C. Glass, "The Legal Status of Clinical and Ethics Policies, Codes, and Guidelines in Medical Practice and Research" (2001) 46 McGill L.J. 473. See also C. Smith and L. Sossin, "Hard Choices and Soft Law: Ethical Codes, Policy Guidelines and the Role of the Courts in Regulating Government" (2003) 40 Alberta Law Review 867.

See http://www.pco-bcp.gc.ca/default.asp?Language=E&Page=Publications&doc=guidemin/guidemin_toc_e.htm.

For further discussion, see C. Smith and L. Sossin, "Hard Choices and Soft Law: Ethical Codes, Policy Guidelines and the Role of the Courts in Regulating Government" (2003) 40 Alberta Law Review 867.

See, for example, the federal government's "Conflict of Interest and Post-Employment Code for Public Office Holders" (1994) (http://strategis.ic.gc.ca/SSG/oe01053e.html) (accessed May 13, 2002).

See "Values and Ethics Code for the Public Service" on the Treasury Board of Canada website at http://www.tbs-sct.gc.ca/pubs_pol/hrpubs/TB_851/vec-cve1_e.asp#_Toc46202820.

[75] The Code contemplates recourse from a Deputy Head to a Public Service Integrity Officer.

[76] B. Thompson, "Whitehall's Cultural Revolution," [1995] 1 Web Journal of Current Legal Issues 1. The UK Civil Service Code was developed as a response to consultations which showed both a breakdown of the "ethos" of the civil service through contracting out and privatization and a lack of confidence in existing civil service structures to respond to alleged government wrongdoing.

[77] Conversation with Baroness Prashar, November 3, 2005.

[78] See the description of each setting in Phase I Report, at pp. 32, 43-47.

[79] Ibid., at pp. 96-100.

[80] Ibid., at p. 47.

[81] See "Management in the Government of Canada: A Commitment to Continuous Improvement" at http://www.tbs-sct.gc.ca/spsm-rgsp/cci-acg/cci-acg_e.asp;
"The Financial Administration Act: Responding to Non-compliance—Meeting the Expectations of Canadians" at
http://www.tbs-sct.gc.ca/report/rev-exa/faa-lgfp/faa-lgfp_e.asp ;
and "Review of the Responsibilities and Accountabilities of Ministers and Senior Officials—Meeting the Expectations of Canadians" at http://www.tbs-sct.gc.ca/report/rev-exa/ar-er_e.asp.

[82] Standing Committee on Public Accounts, Evidence No. 51, Testimony of Hon. Reg Alcock, President of the Treasury Board, and from the Privy Council Office, Mr. Alex Himelfarb, Clerk of the Privy Council, October 25, 2005, pp. 2-3.

ENCOURAGING "RIGHTDOING" AND DISCOURAGING WRONGDOING: A PUBLIC SERVICE CHARTER AND DISCLOSURE LEGISLATION

Kenneth Kernaghan

The major argument in this paper is that the Government of Canada should adopt both a *Charter of Public Service Values* and a statute on disclosure protection—and that these two actions should be closely linked. *A Charter of Public Service Values* is a formal written statement outlining the constitutional position of the public service, including its relationship with the political sphere of government. A Charter would provide a foundation and a framework for good governance by setting the core values of public service within the broader context of the principles of Canada's parliamentary democracy. A disclosure of wrongdoing statute (often described as a whistleblower statute) would provide protection for public servants who reveal information about such forms of misconduct in government as illegal activity and gross mismanagement.

These two ideas—disclosure legislation and a public service Charter—should form an integral part of the overall accountability regime in Canada's federal government. The implementation of both ideas was proposed in the 1996 *Report of the Deputy Ministers Task Force on Charter of Public Service Values and Ethics* (the "Tait" Report) where the Charter idea was discussed in terms of a "moral contract."[1] In the early 2000s, the Government took two major steps towards implementing these ideas. It adopted a policy on the *Internal Disclosure of Wrongdoing* in 2001[2] and the *Values and Ethics Code for the Public Service* in 2003.[3] Breaches of the Code became one of the kinds of wrongdoing under the disclosure policy. The two ideas have since become increasingly central to political and public service discourse. They were included in the recommendations of the 2004 external Working Group on the Disclosure of Wrongdoing[4] and, subsequently, in Bills C-25 and C-11, entitled the *Public Servants Disclosure Protection Act*.[5] At the time this paper was written, Bill C-11, which focused on disclosure and simply committed the Government *to establishing* a *Charter of Public Service Values* and a code of conduct, had not been adopted.

This study sets an examination of the Charter and disclosure ideas within a comparative context. The objective of the study is to examine how learning from experience in other countries can help Canada adopt a Charter and disclosure legislation that best meet its particular needs. The first section of this paper explains briefly the importance of the concept and management of public service values. The second section focuses on the concept of a Public Service Charter, with reference to policies and practices concerning values and ethics in Australia, New Zealand, and the UK (described as the Westminster countries). The third section reviews the disclosure of wrongdoing regime in each of these countries and draws out major learning points for Canada. The fourth section examines alternatives to Canada's current arrangements for protecting disclosures and promoting values, and recommends a strong disclosure regime built on a strong values base.

1 Values and Ethics

Values are enduring beliefs that influence our attitudes and actions. Values influence the choices we make from among available means and ends.[6] Over the past two decades, public service values have become a major component of the management of public organizations, not only in Canada but also in many other countries around the world. On the basis of a comprehensive examination of public sector values, Montgomery Van Wart, a U.S. scholar, concluded that values are so deeply embedded in public management that "[t]he art of values management for practitioners has already become *the leading skill* necessary for managers and leaders of public sector organizations."[7] Public service values occupy a central place in Canada's Tait Report, which concluded that public service reform "must be animated from within by sound public service values," by "values consciously held and daily enacted, values deeply rooted in our own system of government, values that help to create confidence in the public service about its own purpose and character, values that help us to regain our sense of public service as a high calling."[8]

Both the Van Wart book and the Tait Report draw attention to the difference between the closely related concepts of values and ethics.[9] These two concepts should not be used interchangeably because ethical values are a sub-set of values in general. The Tait Report classifies values into four main categories, or "families," of values—*democratic* values, *ethical* values, *professional* values and *people* values. This classification has now been widely accepted in Canada's public administration community and has been entrenched in the federal government's *Values and Ethics Code* and in other official documents.

Over the past decade, the importance of public service values has been considerably elevated in the public service systems of the three

Westminster governments examined in this paper. The New Zealand State Services Commission asserts that "[v]alues are essentially the link between the daily work of public servants and the broad aims of democratic government...."[10] The values contained in Australia's 1999 *Public Service Act* are described as encapsulating "the distinctive character of the Australian Public Service (APS)" and as being "central to the public interest aspect of public sector employment. They provide the real basis and integrating element of the Service, its professionalism, its integrity and its culture of impartial and responsive service to the government of the day."[11] Similar language is contained in the UK's *Civil Service Code* that purports to provide the "constitutional framework" for the public service.

The examination in this paper of public service values in these three countries focuses on the form and content of their central values and ethics documents. The means by which values and ethics are being integrated into the public service as a whole and into individual public organizations are also discussed. Particular attention is paid to the extent to which these efforts inform the movement in Canada towards a *Charter of Public Service*. For each country, reference is made to the four categories of values explained above. An additional distinction is made between *traditional* values (for example, accountability, integrity) and *new* values (i.e., such *professional* values as service and innovation).

An emphasis on the importance of public service values is not an invitation to reduce unduly the use of rules, including ethics rules.[12] A values statement (often described as a code of conduct) is by itself insufficient to ensure values and ethics-based behaviour in the public service. It should be a central component of a regime that includes "such measures as *ethics rules* and guidelines, ethics training and education, ethics counselors or ombudsmen...."[13] Commitment to shared values can help *reduce* the need for rules. Moreover, reference to values helps to explain to public servants the foundation on which rules are based. For example, values like honesty and fairness underpin rules on conflict of interest.

1.1

Australia

Australia leads Westminster-style governments in efforts to integrate values into the structures, processes and systems of its public service. Since the mid-1990s in particular, Australia's federal government has made a clear and continuing commitment to promoting a values-based public service. The objectives of this commitment are a change in public service culture that includes greater relative emphasis on values rather than rules and on results rather than processes. A landmark event in the evolution of values and ethics in Australia was the enactment of a new *Public Service Act* (PSA) in 1999. In respect of values and ethics, the PSA is the culmination of several earlier initiatives and the foundation for the culture change that is being sought. The final explanatory memorandum for the PSA asserted that the values of the Australian Public Service (APS) contained in the Act were designed to:

- provide the philosophical underpinning for the APS;
- reflect public expectations of the relationship between public servants and the government, parliament and the Australian community; and
- articulate the culture and operating ethos of the APS....[14]

The lead section in the PSA is a statement entitled *APS Values* that takes the form of a list of 15 one-sentence assertions. The statement's prominent placement confirms its status as the philosophical foundation for public service values and ethics. Illustrative of the form and content of the *APS Values* are the following:

> (a) the APS is apolitical, performing its functions in an impartial and professional manner;
>
> ...
>
> (e) the APS is openly accountable for its actions, within the framework of Ministerial responsibility to the Government, the Parliament and the Australian public;
>
> ...

> (g) the APS delivers services fairly, effectively, impartially and courteously to the Australian public and is sensitive to the diversity of the Australian public;
>
> . . .
>
> (j) the APS provides a fair, flexible, safe and rewarding workplace; and
>
> (k) the APS focuses on achieving results and managing performance
>
> . . . .

While the list focuses primarily on democratic and ethical values, it also includes people values, traditional professional values and new professional values (for example, achieving results). Since several clauses contain more than one value, the total number of values is considerably greater than 15.

The *APS Values* statement and the APS *Code of Conduct* that immediately follows it are explicitly linked. The statement provides that "the APS has the highest ethical standards," and the Code provides that "[a]n APS employee must at all times behave in a way that upholds the APS Values and the integrity and good reputation of the APS." To a large extent, the statement serves as a values foundation on which the more specific guidance of the Code is built. However, the Code contains not only ethics *rules* on such matters as conflict of interest but also what are generally considered to be values (for example, integrity). Among the provisions of the *Code of Conduct* are these:

> (1) An APS employee must behave honestly and with integrity in the course of APS employment;
>
> (2) An APS employee must act with care and diligence in the course of APS employment;
>
> . . .

(6) An APS employee must maintain appropriate confidentiality about dealings that the employee has with any Minister or Minister's member of staff; and

(7) An APS employee must disclose, and take reasonable steps to avoid, any conflict of interest (real or apparent) in connection with APS employment.

As explained in the next section of this paper, the PSA also provides protection for whistleblowers who report breaches of the Code.

All public servants are required to uphold the *APS Values* and to comply with the *Code of Conduct*. Agency heads are required both to uphold and to foster the Values within their agencies and they have the authority to impose sanctions for breaches of the Code. The Public Service Commissioner has the main responsibility for integrating the Values and the Code into the public service. The Commissioner is required to issue written directions covering each of the Values so as to ensure that the public service respects them and to make clear their scope and application. The Commissioner also submits an annual State of the Service report to Parliament that assesses the extent to which agency heads respect and promote the Values and the extent to which agencies have developed appropriate procedures and systems to ensure compliance with the Code. Finally, the Commissioner has authority to investigate alleged breaches of the Code by agency heads and to report any breaches to the Prime Minister or the agency's Minister.

Long before the 1999 PSA, Australia had adopted *Guidelines on Official Conduct of Commonwealth Public Servants*. The 1995 version of this lengthy document contained extensive guidance on a large number of values and ethics matters for which provision had already been made in statutes, regulations and guidelines. In August 2003, the Public Service Commissioner issued a substantially revised version of the Guidelines under the title *APS Values and Code of Conduct in Practice: Guide to official conduct for APS employees and Agency Heads*. The Guide and the *APS Values* are explicitly linked in that the Guide sets coverage of a broad range of values and ethics matters within an APS Values Framework.

Also in August 2003, the Public Service Commissioner released a "good practice" guide entitled *Embedding the APS Values*. This guide provides materials such as case studies and a checklist to help agencies make values come alive for their employees. The guide notes several factors that are essential to integrating values into the public service:

- the importance of leadership in each agency in promoting the message that the Values are relevant and should be taken seriously;
- employees' perceptions of the extent to which senior managers in the agency model behaviour consistent with the Values;
- the availability of training and other information about the Values and ethical behaviour within each agency;
- the integration of the Values into key corporate documents, especially service/client Charters, Chief Executive Instructions (CEIs) and performance management arrangements; and
- the use of assurance mechanisms such as staff surveys to ensure that Values strategies remain focussed and effective.[15]

The PSA does not set out the *APS Values* in a manner that makes them easy to understand, communicate or remember. This is in part a result of the Government's effort to obtain bi-partisan support for the PSA. Indeed, several Values were added to the list during the legislative process. To make the Values more easily explainable and memorable throughout the public service, they have since been classified into four groups that are broadly similar to the four-fold classification of public service values contained in Canada's *Public Service Values and Ethics Code*, that is, democratic, ethical, professional and people values. The Australian classification, which is based on relationships and behaviours, includes:

1) relationships with the Government and Parliament; 2) relationships with the public; 3) relationships in the workplace; and 4) personal behaviour. The importance in the Australian system of what in Canada are called democratic values is evident in a singling out of those values that reflect the role of the APS "as an institution" and that comprise "the core principles of public administration that have applied in Westminster systems of government for over a hundred years"[16] (for example, accountability, responsiveness, impartiality).

The framework also includes three supporting elements that are the driving forces for integrating the *APS Values* into the public service. The first element is *commitment*, which involves the pursuit of values-based behaviour, especially by senior executives and managers, and learning and development opportunities to sensitize public servants to the importance of making their behaviour congruent with the Values. The second element—*management*—focuses on integrating values into all aspects of the organization so its policies, processes and systems are in tune with the Values. The final element is *assurance*—the requirement for effective accountability mechanisms such as the *Code of Conduct*, to ensure that the Values are being respected, for the imposition of sanctions when necessary, and for staff and client surveys to measure the extent to which the Values are being upheld.

A review of the State of the Service Reports since 1998-1999 suggests that the PSC, supported by vigorous values and ethics programs in some agencies, has made steady progress in "hard-wiring" the *APS Values* into Australia's public service. The 2003-2004 Report concluded, on the basis of an employee survey, that "the vast majority of employees feel they are familiar with the *APS Values* and view them as relevant to their daily work."[17]

1.2

New Zealand

In New Zealand, public service values are set out in the *Public Service Code of Conduct*. Under the authority of the 1988 *State Sector Act*, the State Services Commissioner issued the Code for departmental public servants. A 2005 amendment to the Act authorized the Commissioner to set standards and provide advice on integrity and conduct for a broader range of employees across the "State Services," including those in Crown agencies. The Commissioner also received authority to issue codes of conduct tailored to the needs of specific agencies—to reflect, for example, an agency's particular legal or commercial requirements. The *Code of Conduct* contains three main principles:

- Employees should fulfill their lawful obligations to Government with professionalism and integrity;
- Employees should perform their official duties honestly, faithfully and efficiently, respecting the rights of the public and their colleagues; and
- Employees should not bring their employer into disrepute through their private activities.

The Code elaborates on each principle at some length. The first principle, for example, covers such topics as public servants' obligations to government, political neutrality, public comment on government policy, political participation, and protected disclosures (whistleblowing). Although the Code contains several references to such values as honesty and integrity, neither the word "values" nor the word "ethics" appears in the Code. However, a reading of the Code, together with other official documents, shows that the main public service values in New Zealand are integrity, honesty, political neutrality, professionalism, obedience to the law, respect for the institutions of democracy, respect for the Treaty of Waitangi (on aboriginal peoples), and free and frank advice."[18] Like the *APS Values* statement, the Code speaks primarily to democratic values.

More recently, in 2001, the Minister of State Services, on behalf of all Government Ministers, issued a separate two-part document entitled *Statement of Government Expectations of the State Sector and Commitment by the Government to the State Sector.*[19] The purpose of the document was to provide a clear and concise statement of values. The first part contains a list of 11, mostly democratic, values under the headings of "integrity" and "responsibility," followed by a long list of principles for giving effect to these values in the day-to-day conduct of public servants. The second part briefly outlines four obligations that the Government and Ministers have towards state employees, including, for example, the obligations to "acknowledge the importance of free, frank and comprehensive advice" and to "treat people in the State Sector in a professional manner." It is notable not only that this document was issued by Ministers but also that it prescribes certain mutual obligations of Ministers and public servants. Thus, it comes closer than the country's Public Service *Code of Conduct* and Australia's Values statement to articulating the kind of constitutional position of the public service that would be required in a Public Service Charter.

The State Sector Standards Board, which drafted and recommended the Expectations Statement, envisaged that the Statement would "stand above and guide the development of codes, mission statements or statements of values of individual organizations within the State Sector." A similar purpose was envisaged for the Public Service *Code of Conduct*, which was designed in part to provide "a basis for more detailed codes that are required to meet the particular circumstances of individual departments."[20] The Statement makes no reference to the *Code of Conduct*, however, and the relationship between these two values and ethics documents is unclear. What is clear is that efforts to integrate values into the structures, processes and systems of the New Zealand Public Service have revolved around the *Code of Conduct* rather than the Expectations Statement. The State Services Commission has prepared an elaborate facilitation guide,[21] based on the *Code of Conduct*, to explain the meaning, importance and application of public service values and to encourage public servants to respect these values in their daily work.

1.3

United Kingdom

Like both New Zealand and Australia, the UK has two especially notable documents dealing with public service values and ethics. The main UK document is the *Civil Service Code* that was issued in 1996 by the Minister for the Civil Service under the authority of the Civil Service Order in Council 1995. The Code forms part of the lengthy *Civil Service Management Code* that sets out a broad range of regulations and instructions for departments and agencies on the terms and conditions of employment for public servants. Individual departments and agencies are responsible for setting standards of conduct for their employees that reflect the provisions of the *Civil Service Code*, and for specifying sanctions for Code violations.

Compared to the *APS Values* statement and the *New Zealand Code of Conduct*, the *Civil Service Code* focuses somewhat more on democratic values and expresses their importance in more elegant language. It is also more concerned with the constitutional role of the public service in its relations with Ministers and Parliament. It begins by asserting that the "constitutional and practical role of the Civil Service is, with integrity, honesty, impartiality and objectivity, to assist the duly constituted Government... in formulating [its] policies, carrying out decisions and in administering public services for which [it is] responsible."

To a greater extent than New Zealand's Expectations Statement, the *Civil Service Code* sets out obligations for Ministers as well as for public servants. The Code is to be seen in the context of the responsibilities of Ministers contained in the Ministerial Code. These include:

- the duty not to use public resources for party political purposes, to uphold the political impartiality of the Civil Service, and not to ask civil servants to act in any way which would conflict with the *Civil Service Code*; [and]
- the duty to give fair consideration and due weight to informed and impartial advice from civil servants, as well as to other considerations and advice, in reaching decisions.

Like New Zealand's *Code of Conduct*, the UK *Civil Service Code* is permeated by references to values, but the term "values" is never used. This is not the case with a second major document dealing with public service values and ethics. The *Vision and Values Statement*[33] was adopted at a meeting of permanent heads of departments in 1999. Its purpose was to make values come alive by embedding them in the day-to-day conduct of public servants. The Statement contains a list of "common principles" or "values" on which departments and agencies can build their own statements. The public service is encouraged to reflect the values in the main management processes of recruitment and selection, training and development, and performance management. More specifically, the performance management system should "recognize and reward the people who deliver and uphold the values; confront the poor performance of the people who consistently work against the values; and develop competencies...which reflect the behaviours required to underpin the vision and values."[34]

The Statement complements the Code by emphasizing professional values (for example, innovation, results) but not to the exclusion of democratic and ethical values. The Statement does not seem to have gained much traction in the UK's values and ethics regime. The Code, which itself asserts that it is "*the key statement* of the rights and responsibilities of civil servants," has maintained its central status. This is reflected in the recent discussion of the desirability and content of a Civil Service Act for the UK. In January 2004, the House of Commons Public Administration Select Committee (PASC) submitted for the Government's consideration a draft civil service bill[24] incorporating the *Civil Service Code* in substantially its existing form. The intent was to provide a framework whereby Parliament could "ensure that public service principles are upheld and that civil servants and others are carrying out their jobs with propriety." The Government responded in November 2004 with a consultation document containing a draft civil service bill of its own that was similar to the PASC bill.[25] PASC noted that this was the first time in history that a UK government had proposed "to put the Civil Service on a statutory footing, and give its core values constitutional protection."[26] PASC noted also, however, the suspicion that the Government is not really committed to a civil service bill.

Compared to the *APS Values* statement and the New Zealand Public Service *Code of Conduct*, the overall format, language and content of the UK Code provides the best model for a Canadian *Charter of Public Service*. We shall return to this topic after an examination of the issue of disclosure of wrongdoing.

2 The Disclosure of Wrongdoing

This section examines the disclosure protection regimes adopted recently in Australia, New Zealand and the UK. In all three countries, the main values document contains, or is linked to, disclosure protection for public servants. However, each country's disclosure regime differs significantly from the others and thereby provides Canada with a variety of models from which to learn. Note that this study follows the practice in New Zealand and the UK of using the term "disclosure of wrongdoing" rather than "whistleblowing." The latter term has invidious connotations of "tattling" and "squealing" that undermine efforts to make the disclosure of wrongdoing an integral and praiseworthy part of a public servant's duties.

The examination of the three disclosure regimes provided below is not an exhaustive treatment of the many dimensions and complexities of such regimes. The focus is on those features that seem most likely to inform decisions on disclosure arrangements for Canada. The main topics discussed for each country are: the portion of public sector employees covered by the regime, the definition of wrongdoing, the roles and powers of the main actors, the protection of "disclosers" from reprisal, false allegations, and experience to date. The term "regime" is used to sum up the means and mechanisms by which [illegible] particular jurisdiction manages public servants' disclosure of wrongdoing in government.

2.1

Australia

The sections of Australia's 1999 *Public Service Act* (PSA) dealing with the APS *Code of Conduct* are followed immediately by section 16 on "Protection for whistleblowers." This section, like the PSA itself, applies to all public service employees. Unlike disclosure schemes in most other countries, including New Zealand and the UK, the PSA does not define categories of wrongdoing that may justify disclosure. Rather, an employee can be involved in wrongdoing by violating one or more of the 13 requirements of the Code, including, for example, the provisions that employees must behave honestly and with integrity. For the purpose of an employee survey relating in part to whistleblowing that was conducted by the Public Service Commission (PSC), illustrations of a "serious breach" of the Code were said to include such offences as fraud, theft, misusing clients' personal information, sexual harassment and leaking classified documentation.[17]

A critical feature of the Australian disclosure regime is the expectation that most disclosures will be made and investigated within the agency rather than by any external authority. Within the framework of minimum directives set down by the Public Service Commissioner, the design of agency mechanisms for managing disclosures is left to the agencies themselves. The PSA requires agency heads to establish procedures for handling disclosure reports and for determining whether a breach of the Code has occurred. It also gives agency heads authority to impose sanctions for Code violations. Agencies are required to investigate disclosure reports unless they consider them to be frivolous or vexatious. Agencies are also required to apply their regular disclosure procedures to anonymous disclosures, if these disclosures are accompanied by sufficient evidence to warrant an investigation.

An employee may make disclosure reports directly to either the Public Service Commissioner or the Merit Protection Commissioner, but only when the Commissioner agrees that the matter is too sensitive to be disclosed to an agency head (for example, if the report alleges wrongdoing by the agency head). Also, an employee may refer an allegation to either Commissioner if he or she has made a disclosure report within an agency but is not satisfied with the outcome of the investigation. The Commissioners will not investigate a report that they consider frivolous or vexatious. Both the Commissioners and the agencies are required to conduct their inquiries with due regard for procedural fairness. Following their investigation of a disclosure report, the Commissioners have authority only to recommend, not to direct, that the agency take remedial action. In practice, the heads of agencies usually, but not always, follow the recommendations.

The whistleblower section of the PSA provides that employees who report breaches (or alleged breaches) of the Code must not be subjected to victimization or discrimination. Retaliatory action against employees who disclose wrongdoing could constitute a breach of the Code and could, therefore, be investigated by the PSC. If necessary, the Public Service Commissioner could recommend to the Minister that sanctions be applied for reprisal that has taken place in an agency, but in practice such matters are handled almost exclusively within the agencies.[78]

Since Australia's disclosure legislation dates only from 1999, drawing firm conclusions about its long-run effectiveness is premature. The number of reports of wrongdoing has so far been surprisingly small. In 2003-2004, the number of suspected breaches reported under section 16 was only about two percent of the total breaches of the Code that were reported. There was concern, however, that some agencies were not categorizing correctly the "whistleblower complaints" received.[39] During the same reporting period, the Merit Protection Commissioner received six disclosure reports, only one of which was accepted for investigation. The issues raised included such personnel matters as leave entitlements and probation, harassment, and recruitment processes.[40] The Public Service Commissioner received 12 reports. The four reports that were deemed to warrant investigation dealt with such matters as abuse of powers by an agency head and a senior employee, and failure to comply with the law in relation to approval of a leave application.[41]

An employee survey conducted for the 2003-2004 State of the Service report found that 22% of employees had low confidence that they would not be victimized or discriminated against for reporting a suspected serious breach of the Code involving their supervisor/manager (25% for other managers and 19% for peers/colleagues).[42] The survey also found that employees who had actually witnessed a suspected serious breach were much more likely to have low confidence that they would be protected against reprisal.[43]

The 2004 draft report of the National Integrity System Assessment of Australia described the section 16 whistleblower scheme as inadequate and said that reports by the Public Service Commission that the scheme is working well are "not persuasive."[44] Among the deficiencies identified in the report were that the scheme applies only to APS employees rather than the entire public sector; the nature of the matters covered is vague; protection from reprisal is limited; and "there is no clear independent investigative or remedial capacity given limitations on the statutory role of the Public Service Commission."[15]

2.2

New Zealand

The New Zealand *Protected Disclosures Act 2000* (PDA) came into effect on January 1, 2001. The PDA covers both public and private sector employees. It is concerned with "serious" wrongdoing in the categories of:

- an unlawful, corrupt, or irregular use of public funds or public resources; or
- an act, omission, or course of conduct that constitutes a serious risk to public health or public safety or the environment; or
- an act, omission, or course of conduct that constitutes a serious risk to the maintenance of law, including the prevention, investigation and detection of offences and the right to a fair trial; or
- an act, omission, or course of conduct that constitutes an offence; or
- an act, omission, or course of conduct by a public official that is oppressive, improperly discriminatory, or grossly negligent, or that constitutes gross mismanagement.

Employees are protected in their disclosures if they adhere to certain requirements. In substantive terms, they are protected if their disclosure relates to wrongdoing in the public or private sector and if the discloser reasonably believes that the allegation is true or likely to be true, is making the disclosure so that serious wrongdoing will be investigated, and wishes the disclosure to be protected.

There are also procedural requirements for protected disclosures. As in the Australian case, New Zealand's PDA requires that, in general, disclosures must be made in accordance with the internal procedures of the organization. Among arguments that have been offered for this internal disclosure system are that it will ensure that no legitimate disclosure is made without the organization's knowledge; it will increase the organization's involvement, certainty and control over potentially serious issues; and it will enhance the organization's communications, culture and reputation with staff, stakeholders and the public.[16]

A disclosure report can be made to the head of the organization if the organization has not established internal procedures for disclosure or if the discloser reasonably believes that the person authorized to receive the disclosure may be involved in the wrongdoing or is associated with a person who may be involved. Moreover, disclosure may be made to an "appropriate authority" outside the organization if the discloser reasonably believes that the head of the organization is involved in the wrongdoing, if immediate reference to an appropriate authority is justified by the urgency of the matter, or if no action is taken on a disclosure within 20 days. Finally, in certain circumstances (for example, the person or appropriate authority to whom a disclosure was made decides not to investigate the matter) a disclosure can be made to a Minister of the Crown or an Ombudsman.

The Act provides a remarkably long list of appropriate authorities, including the Controller and Auditor General, the Commissioner of Police, the State Services Commissioner, the Director of the Serious Fraud Office, the head of every public organization, and the Ombudsmen. The latter are independent officers of Parliament who are singled out in the PDA from the other appropriate authorities as being responsible for such tasks as providing information and guidance to disclosers and serving as the only appropriate authority for certain departments. A review of the Act's operation that was published in late 2003 concluded that the most beneficial change would be greater involvement by an authority such as the Office of the Ombudsmen to assist disclosers, coordinate the referral of matters to the appropriate agencies, and monitor the Act's operation.[17]

If employees suffer reprisal for making a disclosure report, they can lodge a personal grievance under the *Employment Relations Act*. They are also protected from civil, criminal or disciplinary proceedings "despite any prohibition of or restriction on the disclosure of information under any enactment, rule of law, contract, oath, or practice" (Section 18). Finally, the PDA provides strong protection for the confidentiality of the discloser. These protections do not apply, however, if disclosers make an allegation that they know is false or otherwise act in bad faith.

New Zealand's experience with its disclosure regime has been even briefer than that of Australia. As in Australia, the number of reports of serious wrongdoing has been remarkably small. The reasons offered for this low number are very similar to those in other Westminster jurisdictions, but are highly speculative. They include the argument that individual organizations are dealing effectively with any reports of serious wrongdoing, so there is no need to involve other authorities; the kinds of wrongdoing defined in the PDA are rare; the existence of the PDA is not well enough known; employees do not believe that they will be adequately protected if they do disclose wrongdoing; and people feel uneasy about disclosing real or possible wrongdoing by others.[59]

The 2003 review identified several deficiencies in the PDA, including its inconsistent application, problems arising from an excess of "appropriate authorities," and a strong feeling that the identity of disclosers could not be kept confidential. The review also concluded that the PDA worked well where its provisions "had been incorporated into an organization's culture of risk management and its institutions relating to appropriate ethical conduct."[60] The PDA is formally linked to the Public Service *Code of Conduct* by means of a half-page summary in the Code of the PDA's objectives and main features.

2.3

United Kingdom

Compared with New Zealand's Code, the UK *Civil Service Code* deals much more substantively with the disclosure of wrongdoing. Indeed, the disclosure provisions in the UK Code are an integral part of the disclosure regime. The other main mechanism is the *Public Interest Disclosure Act* (PIDA) that came into effect in July 1999. The PIDA covers not only all public sector employees (except in such areas as security services), but private sector employees as well.

The categories of wrongdoing that "qualify" for protection are similar to those in the New Zealand PDA, namely:

- a criminal offence;
- a failure to comply with a legal obligation;
- a miscarriage of justice;
- the endangering of the health or safety of an individual;
- damage to the environment; and
- deliberate concealment of information that could disclose the existence of any of these types of wrongdoing.

In addition, the *Civil Service Code* states that employees should report any instances in which they are required to act in a manner that:

- is illegal, improper, or unethical;
- is in breach of constitutional convention or a professional code;
- may involve possible maladministration; or
- is otherwise inconsistent with this Code.

Employees are also advised to report evidence of criminal or unlawful activity and any instances in which they become aware of breaches of the Code or are required to act in a manner that "raises a fundamental issue of conscience."

In Australia, employees are *expected* and *encouraged* in the first instance to make disclosure reports within their agency. In the UK, as in New Zealand, internal reporting of disclosures is *required*, subject to a few exceptions. UK departments are required to establish clearly defined procedures for handling disclosure reports. The PIDA sets out a complex system of disclosure procedures that is divided into four categories. The first category, *internal disclosures*, refers to the standard procedure whereby employees make disclosure reports in the first instance within their department. There are three categories of external disclosures: *regulatory disclosures*, *wider disclosures*, and *disclosures of exceptionally serious matters*. These involve disclosures to a range of entities (for example, Ministers, MPs, the media). Resort to these mechanisms is justified by such considerations as the possibility that evidence would be destroyed, or the serious nature of the alleged offence. The *Civil Service Code*, which applies only to public sector employees, provides that employees who do not believe that their department has given them a reasonable response to their disclosures may appeal to the Civil Service Commissioners, an independent body. If the Commissioners' investigation leads them to uphold the appeal, they will "make recommendations" for remedial action to the discloser's department. The UK government, in its consultation document regarding a civil service bill, supports the idea of permitting public servants to take their complaint directly to the Commissioners if the requirement to make an internal allegation first could act as a deterrent to disclosure.[40]

The PIDA provides protection against reprisal for disclosers who have respected the Act's procedural requirements, but who are victimized or dismissed for making a qualifying disclosure. Employees may seek redress and compensation by presenting a claim to an employment tribunal. The PIDA does not explicitly provide protection for the confidentiality of a discloser's identity, nor does it contain prohibitions or penalties regarding false allegations.

As in Australia and New Zealand, there is very little information on the effectiveness of the UK's disclosure regime. Public Concern at Work, a whistleblower support organization, reported that employees had made 1,200 reprisal claims before employment tribunals during the first three years of the PIDA, but it provided no information as to how many of these complaints involved the public sector.[41] The Civil Service Commissioners heard no appeals during 2003-2004.[42] The UK's Parliamentary Committee on Standards in Public Life has "emphatically endorsed" several principles of good disclosure practice that were put forward by Public Concern at Work. These principles were ensuring that employees know about and trust the disclosure mechanisms; that employees have realistic advice on the implications of disclosure for openness and confidentiality; that there is continual review of how the procedures work in practice; and that employees are routinely informed of the disclosure channels available to them.[43]

Given the complexities of disclosure regimes, it is useful to summarize their main dimensions in the three Westminster countries and to compare these dimensions briefly with the Canadian federal government's current *Internal Disclosure Policy* (IDP).

None of the three regimes examined above has attracted a significant number of disclosures of serious wrongdoing by public servants. Australia's employee survey indicates that a major explanation for this result may be that public servants do not believe that they will be adequately protected from retaliation if they disclose wrongdoing. This is the most frequent explanation offered in New Zealand and the UK as well. Both the evidence from these three countries and common sense suggest that adequate protection from reprisal must be a central element in any disclosure regime. There are other elements, however, that can help to support protection against reprisal, and that are essential to the overall effectiveness of a disclosure regime. The three countries vary substantially in the manner in which they handle these elements.

Both New Zealand and the UK have a disclosure statute that covers the private as well as the public sector, whereas the Australian regime covers only the public sector and is embedded in a *Public Service Act* covering a variety of human resource matters. In all three countries, the disclosure scheme applies to a broad range of public sector employees—a broader range than that provided in Canada's IDP.

The New Zealand and UK statutes set out the categories of wrongdoing that are usually included in disclosure regimes around the world, whereas Australia's PSA defines wrongdoing as breaches of its *Code of Conduct*. Canada's IDP combines these two approaches by listing the conventional justifications for disclosure, but including a breach of the *Values and Ethics Code* as a category of wrongdoing.

Public servants will tend to be confused by a disclosure regime that identifies more than one authority outside their department or agency to which disclosures can be made. New Zealand lists several authorities, and even Australia and the UK offer more than one. If more than one external authority is available, public servants should be able to understand easily which authority is most likely to deal effectively with their concern. Canada's IDP provides for a Public Service Integrity Office that receives disclosures from public servants who believe that a disclosure cannot reasonably be made within their own organization or that a disclosure made within their organization has not been appropriately handled. Thus, Canada has a single authority, but one that is located within the public service and that is not widely perceived as sufficiently independent of government.

Public servants in New Zealand and the UK are *required* to exhaust internal remedies before appealing to an outside authority, whereas Australia's public servants are *expected* to do so. The rationale for use of the internal disclosure system in the first instance was explained above for New Zealand. The same reasons apply to Australia and the UK — and to Canada, where public servants are responsible under the IDP for following the internal procedures for raising instances of wrongdoing.

Australia, New Zealand and the UK all provide protection against reprisal for public servants who disclose wrongdoing. In Canada, the IDP permits public servants to complain about reprisal to a Senior Officer (who is responsible for receiving disclosures and managing disclosure procedures within the organization) or to the Public Service Integrity Officer. They may also resort to other specified redress mechanisms. Since reprisals cannot be taken against disclosers whose identity is kept confidential, the confidentiality provisions of each disclosure regime are extremely important. These provisions seem to be strongest in New Zealand and weakest in the UK. Canada's IDP notes that confidentiality in respect of disclosures is subject to the *Privacy Act* and the *Access to Information Act* and that the departmental Senior Officer and the Public Service Integrity Officer will explain the parameters of confidentiality to disclosers. This approach is unlikely to encourage public servants to make disclosures, but the reality is that there is tension between the duty to preserve the anonymity of the discloser and the principles of natural justice, notably the right to know the identity of one's accuser.

3 Building Strong Disclosure Protection on a Strong Values Foundation

3.1

Disclosure Protection

Canada's decisions on the best means of developing disclosure protection and promoting public service values and ethics can be informed by experience in the other Westminster countries discussed above. It is essential to keep in mind that the experience in these countries has been brief. Both comparative analysis and domestic experience suggest that if Canada's disclosure regime is to have public credibility, it must be a strong one. It is risky, on the basis of experience elsewhere, to assert with confidence that a strong regime will necessarily be an effective one. It is likely, however, that a strong statutory regime will be *more* effective than the current policy-based one.

To a large extent, the desirable elements of a Canadian regime were outlined in early 2004 by an external Working Group on the Disclosure of Wrongdoing.[44] The Working Group's deliberations took place in the midst of widespread public, media and political concern about wrongdoing in government that led to the creation of the Commission of Inquiry into the Sponsorship Program and Advertising Activities (the Gomery Inquiry).[45] While this brief paper cannot review the facts and allegations about unethical and illegal activities that have come to light in recent years, it is clear that these activities have resulted in widespread public support for a stronger disclosure regime. The Public Service Integrity Officer, who was appointed in 2001 under the IDP, has made a forceful case for a stronger regime. His first Annual Report,[46] which was tabled in Parliament in September 2003, recommended improvement of the current disclosure mechanism by basing the Public Service Integrity Office (PSIO) in a statute rather than in a policy. The report also recommended that the PSIO be removed from the ambit of the Treasury Board and be given an independent status that would enhance its credibility and help to attract disclosures of "public interest" wrongdoing rather than primarily employment-related concerns.

The Working Group made similar recommendations.[47] Several of these recommendations are shown below because they provide a Canadian response to the disclosure issues discussed in the comparative sections of this study. They have also influenced substantially the content of Bills C-25 and C-11 on disclosure protection. Among the Working Group's 34 recommendations are these:

> (1) A new, legislated, regime is required for the disclosure of wrongdoing.
>
> . . .
>
> (3) A disclosure regime should cover as much of the federal public sector workforce as possible, including separate employers and Crown Corporations.
>
> (4) The regime should be based on a definition of "wrongdoing" similar to that used in the current policy, though it should be refined and expanded to include serious or flagrant breaches of the *Values and Ethics Code for the Public Service* and reprisal resulting from good faith disclosures of wrongdoing.
>
> (5) A new "Office" should be created that would incorporate the functions of the existing Public Service Integrity Office and would act as an independent investigative body for matters relating to the disclosure of wrongdoing.
>
> (6) The new "Office" should be created as an Agent of Parliament, accountable to Parliament either directly or through a Minister.
>
> . . .
>
> (9) The Office should be authorized to investigate any allegations it deems relevant, regardless of the source of the complaint, if there is compelling evidence that wrongdoing has taken place, or will take place.
>
> . . .

> (11) While employees should be encouraged to use internal mechanisms for dealing with wrongdoing, they must be given the option of taking allegations directly to the Office.
>
> . . .
>
> (16) To effectively protect information related to investigations, the Office should be subjected to a statutory prohibition against release of such information, to the extent possible.
>
> (17) The identity of a person making allegations of wrongdoing should be protected to an extent compatible with the principles of natural justice.
>
> . . .
>
> (23) Flagrant and intentional misuse of disclosure mechanisms should be subject to disciplinary action, up to and including dismissal.

The Working Group encountered some resistance to its idea that the disclosure regime should be applied as far as possible to the whole of the public sector, including Crown Corporations and public agencies. The Group argued that these non-departmental entities should at the very least be required to adopt internal disclosure regimes based on the model set out in the report. The resistance to this recommendation was undermined by subsequent revelations and allegations of wrongdoing involving officials in certain Crown Corporations.

In addition to the recommendations noted above, the Working Group recommended that the position of Senior Officer in each department be strengthened so that public servants would feel comfortable raising disclosure issues within their department instead of taking their concerns to an authority outside the department. Though the Working Group concluded that public servants should be strongly encouraged to exhaust internal remedies before submitting allegations to an outside authority, the Group suggested that public servants "be given the option of *taking allegations directly to the Office, without having to first exhaust internal mechanisms*."[48] This option is not available in the other Westminster systems.

While some public servants have been involved in recent allegations of wrongdoing in government, a relatively larger number of politicians, political appointees and party officials have been implicated. In this context, the Working Group noted that the current IDP does not permit the PSIO to "follow credible trails of responsibility that lead beyond the public service." With a view to fostering ethical government in general, the Group argued that under the proposed new regime "allegations of wrongdoing must be followed to their source, regardless of whether the alleged wrongdoing stemmed from a decision taken within the public service bureaucracy or from an order or request from a Minister's office."[vii] It is desirable also that an integrity officer investigating disclosures by public servants should be able to coordinate efforts with other investigative bodies, including the Ethics Commissioner for the House of Commons and the Senate Ethics Officer.

The Working Group did not specify institutional arrangements for the disclosure regime beyond recommending the creation of a new office to replace the existing Public Service Integrity Office and to act as an independent investigative body accountable to Parliament, either directly or through a Minister. There was considerable debate during parliamentary committee hearings on Bill C-11 as to whether a new office was needed or whether the responsibilities for managing the disclosure regime should be added to those of the Public Service Commission or the Office of the Auditor General. Most of the committee witnesses argued that a separate office of a public service integrity commissioner would be the most credible and effective option.

Experience in Australia, New Zealand and the UK suggests that the major reason for public servants' reluctance to disclose serious wrongdoing is fear of reprisal. A frequently asked question during the recent scandals in Canada was why public servants who knew about the wrongdoing did not report it. A 2003 study for Canada's Treasury Board Secretariat sheds some light on this question. The study was prompted by allegations of wrongdoing in the Office of the Privacy Commissioner. The primary reasons that employees gave for non-disclosure were "fear of reprisal (92%) and lack of faith in managers' ability (69%) and intent (58%) to protect staff. Other barriers were the lack of understanding of the policy (35%), a culture of acceptance (25%), and [lack of] understanding of public service values (21%)."[50] Fewer than half of the 48 employees surveyed were aware that they would be protected under the IDP if they made disclosure reports, and only three employees thought that they would receive adequate protection. It is important to keep in mind that the IDP was not adopted until 2001.[51]

The disclosure regime that the Working Group envisaged for Canada is stronger than those in Australia, New Zealand and the UK. It would provide more robust protection than the current IDP. Moreover, a weak disclosure statute, like that contained in Bill C-25, is bound to fail. Even a strong disclosure regime will not guarantee that public servants will report all, or even most, instances of serious wrongdoing.

The failure of public servants to disclose wrongdoing despite statutory protection is one of several arguments advanced by opponents of disclosure legislation for Canada.[52] Among these arguments is the assertion that the IDP is only four years old, that its existence and content are not well known yet, and that over time it may prove to be an effective and, therefore, a credible mechanism. Another broad argument is that getting the balance right among contending considerations in a disclosure statute is extremely difficult. A major objective of the legislation is to encourage public servants to disclose wrongdoing while safeguarding them from retaliation. However, these two considerations must be balanced not only against one another but also against the need to ensure that the alleged wrongdoer is protected from frivolous or vexatious allegations that may unfairly damage his or her reputation. Furthermore, to protect against reprisal, an employee's identity must be kept confidential, but the principles of natural justice require that within reasonable limits the alleged wrongdoer may have the right to know the identity of the person making the allegation. Canada's Information Commissioner has highlighted the difficulty of getting the balance right in his lament that Bill C-11 provides for amending the *Access to Information Act* to require that all documents relating to an allegation be kept confidential for up to 20 years.[34] Finally, there is concern about adding a Public Integrity Commissioner to what is already a long list of officers of Parliament.

To reduce the need to sort out these difficult issues in practice, it is helpful to discourage wrongdoing in the first place. In this context, it is important to note that the Working Group's terms of reference went beyond the issue of disclosure. The Group was requested to examine the extent to which an emphasis on public service values and ethics could serve "as a positive means for supporting ethical government and for the disclosure of wrongdoing." The Group's response was to propose that its recommendations on disclosure be set within a positive framework of values and ethics rather than simply within a statute focused exclusively on wrongdoing. This approach would signal to Canadians that "right-doing" based on core public service values will be encouraged and that wrongdoing, when it occurs, will be disclosed and punished. Effective means are required not only to deter wrongdoing in the short term but also to foster a culture of "right-doing" over the longer term. The Group noted that the vast majority of public servants are honest, industrious professionals with no involvement in unethical or illegal activities and that an exclusive focus by Parliament on disclosure legislation would send the wrong message to Canadians.

3.2

The Public Service Charter

Disclosure of wrongdoing is only part of the many value and ethical concerns that need to be covered by a *Charter of Public Service Values*. Moreover, the Tait Task Force called for a statement of principles that went beyond laying a foundation of core public service values to provide "a new moral contract between the public service, the Government *and the Parliament of Canada*."[54] In particular, it was envisaged that this statement would include principles clarifying relations between public servants and parliamentary committees—"an area where public service values and conventions have been subject to great pressure in recent years."[55]

Dr. Ralph Heintzman, the Task Force's Executive Director, subsequently articulated this idea of a moral contract as an integral part of a Public Service Charter.[56] Then, as already noted, the Working Group on the Disclosure of Wrongdoing recommended that both Ministers and Parliament consider legislation that would embed a disclosure of wrongdoing regime within a broad framework of public service values and ethics. The Working Group argued that this would provide an opportunity for the Government and Parliament to establish a moral contract between the elected and non-elected spheres of Government "as the necessary foundation for public service values, *and for ethical government*."[57] This approach "could commit and bind ministers, MPs and public servants alike, in support of a professional public service, dedicated to the public interest."[58] The Working Group's proposal was in essence a call for a Public Service Charter that would do more than list the core values of public service. It would explain the constitutional position of the public service by setting the core values within the broader context of a three-way relationship between public servants, government and Parliament.

In April 2004, the federal Government introduced into Parliament Bill C-25—the *Public Servants Disclosure Protection Act*—which was then referred to the House of Commons Standing Committee on Government Operations and Estimates. The preamble to the Bill recognizes that confidence in public institutions can be increased by adopting effective procedures for public servants' disclosure of wrongdoing, by protecting public servants who disclose wrongdoing, and by adopting a code of conduct for the public sector. In addition, the Bill's preamble commits the Government "to establishing a Charter of Values of Public Service setting out the values that should guide public servants in their work and professional conduct." Section 4 of the Bill requires that the Treasury Board establish the code of conduct. The preamble to Bill C-11, a revised version of Bill C-27 that was referred to the Committee in November 2004, contains identical wording.

Bill C-25 was widely criticized as a weak and inadequate response to the Working Group's recommendations and to the concerns of a wide range of Canadians who testified about the Bill. Bill C-11, which adopted many of the Group's recommendations, was much more positively received. It must be noted, however, that virtually all of those who testified on Bill C-11 suggested additional changes. What Dr. Keyserlingk, the current Public Service Integrity Officer, said about Bill C-25 also applied to Bill C-11. He observed that the Bill "contains no framework of ethics and values," and that it "contains no discernible reflection of the guiding principles and priorities that should infuse such a bill."[illegible] Unlike Australia's PSA, Bill C-11 does not base its disclosure regime on a foundation of such core public service values as accountability and honesty. Nor does the Bill entrench a statement of values and a code of conduct in the statute itself. The Bill commits the Government to adopting a Charter and a code but it does not signal or specify the form they should take. It is important, therefore, to consider various options for providing both disclosure protection and a foundation for public service values and, more broadly, for ethical government in Canada.

Among the possible options are:

- a statute on disclosure and a separate values statement/code of conduct in the form of a central agency requirement authorized by a public service act—the New Zealand approach;

- a statute on disclosure and a separate values statement/code of conduct as a condition of employment that also contains disclosure provisions—similar to the UK approach;

- a statute with a statement of values and a code of conduct as the centerpiece but also providing disclosure protection—the Australian approach;

- a statute with a public service Charter and a code of conduct as the centerpiece but also providing disclosure protection—a variation of the Australian approach;

- a statute *focusing on* the disclosure of wrongdoing but *calling for* the separate adoption of a public service Charter and a code of conduct—Canada's Bill C-11 approach;

- a statute *focusing on* the disclosure of wrongdoing but *calling for* the separate adoption of a public service Charter and a code of conduct *in the form of a statute or a parliamentary resolution*—a variation on the Bill C-11 approach;

- a statute on disclosure and a separate statute (or a parliamentary resolution) providing a public service Charter and a code of conduct; and

- a statute on disclosure and a separate statute (or a parliamentary resolution) providing a public service Charter that underpins a separate code of conduct.

Options four through eight are likely to be most acceptable to the various political actors with an interest in fostering "right-doing" and preventing wrongdoing in Canadian government. The preferred option will depend to some extent on one's view as to how closely the Charter and disclosure protection should be linked (i.e., in the same document or simply cross-referenced). Another important consideration is one's assessment of the arguments for and against adopting a Charter in statutory form or as a parliamentary resolution rather than in such non-legislative forms as a policy or Order in Council. Enshrining a Charter in a statute or a parliamentary resolution could:

- signal and symbolize strong political support for the Charter, including the support of parliamentarians as well as Ministers;
- promote greater public, parliamentary and media discussion of, familiarity with, and respect for the Charter;
- inform the public in a highly visible manner about the values for which public servants stand, and their rights and responsibilities in relation to politicians;
- foster greater bi-partisan support for the Charter; and
- provide a firm legal basis for promoting and requiring compliance.

Adopting a Charter in the form of a policy or Order in Council could:

- inform the public to a modest extent about the values for which public servants stand and their rights and responsibilities in relation to politicians;
- be easier to adopt than a statute;
- be easier to revise than a statute; and
- avoid partisan conflict over the Charter's form and content.

In the governmental context, the term "Charter" has been applied to a wide variety of documents, including the *Magna Carta*, the *Canadian Charter of Rights and Freedoms*, and the State of Queensland (Australia)

Public Service Charter.[60] The latter document is in essence a statement of values. It was not sponsored or formally endorsed by the state's elected representatives. Rather, it was adopted by the public service itself as a statement of public servants' commitments to the people, to the government of the day, and to a professional public service. The document constitutes a one-way flow of commitments that imposes no reciprocal obligations on the Government or Parliament.

In this paper, the term Charter is used in a stricter sense to refer to a statement of rights and responsibilities that is bestowed by the people's representatives in the legislature. To have the Cabinet alone issue the Charter would be a second-best approach. A public service Charter should include, but should go beyond, a statement of core public service values to set out the constitutional position of the public service in relation to the political side of government. The legitimacy of the Charter would, therefore, be enhanced by the formal endorsement of the legislature. A parliamentary resolution could accomplish this. In addition, the Charter should follow the example of the UK *Civil Service Code* which states that the Code "should be seen in the context of the duties and responsibilities set out for UK Ministers in the Ministerial Code," which include giving due consideration to public servants' informed and impartial advice and complying with the law.

The Charter should be positioned as the centrepiece of the Government's values and ethics regime. A common characteristic of such regimes around the world is the proliferation over time of a variety of statements, codes, rules and guidelines, many of which have emerged in response to particular events. One result of this accumulation of instruments is that it is often difficult for public servants to get a coherent, comprehensive and comprehensible picture of their values and ethics requirements. Moreover, some of these instruments impose requirements on politicians, as well as on public servants.

It is important to rationalize and cross-reference a government's main values and ethics documents. For this purpose, it is helpful to have a central document like a Public Service Charter to provide a foundation on which the overall values and ethics edifice can be built. While the *APS Values* statement and the New Zealand *Code of Conduct* help to serve this purpose by providing a foundation of core public service values, they provide a less adequate basis for ethical government in general because, unlike the UK Code, they say relatively little about relationships between politicians and public servants. As in the existing *Code of Public Service Values and Ethics*, pride of place in the Charter should be given to democratic values. It is democratic values like accountability, neutrality and legality that distinguish the public service from other sectors of society, and it is democratic values that define the three-way relationship between Ministers, Parliament and the public service. The Tait Report argued that the role of the public service should be set "within the principles of federalism and responsible government: to anchor the public service in its primordial [democratic] values."[61]

A Charter for Canada's public service should include reference to the government's disclosure legislation or policy, as well as to such other central and related documents as the *Guide for Ministers and Ministers of State*[62] and the *Guidance for Deputy Ministers*.[63] These two documents are already linked. *Guidance for Deputy Ministers* makes explicit reference to the existence and content of the *Guide for Ministers*. And while this Guide preceded the *Guidance for Deputy Ministers*, it is linked conceptually to it through its provision that public servants should respect the traditional political neutrality of the public service[64] and that Ministers should respect the non-partisan nature of the public service.[65]

Guidance for Deputy Ministers contains a substantial section on values and ethics in which the four families of values are explained, and in which emphasis is placed on the critical leadership role of Deputy Ministers in upholding and demonstrating public service values and ethics.

Reference is made to other central values and ethics documents: the *Values and Ethics Code* for the Public Service, the Policy on the Internal Disclosure of Information Concerning Wrongdoing in the Workplace, and the Conflict of Interest and Post-Employment Code for Public Office Holders. *Guidance for Deputy Ministers* also includes reference to the *Management Accountability Framework* (MAF) adopted by the Treasury Board of Canada Secretariat in June 2003. The MAF consists of ten essential components of sound management, including a Values and Ethics component asserting that "[t]hrough their actions, departmental leaders continually reinforce the importance of public service values and ethics in the delivery of results to Canadians (e.g. democratic, professional, ethical and people values)." MAF is used as a basis for bilateral meetings between the Secretary of Treasury Board and Deputy Ministers to review how well Deputies are managing their departments.

The values statements in Australia, New Zealand and the UK all put considerable emphasis on accountability, but include little or nothing on the public service values of transparency and openness. Over the past decade in particular, the latter values have become increasingly important in the Canadian context. The Information Commissioner has lamented the culture of secrecy in the federal government, and it has become clear that this culture is partly to blame for recent wrongdoing involving both politicians and public servants. The Charter should speak to the duty of public servants to be as open and transparent as possible in their relations with both elected representatives and the public.

The Charter of Public Service Values, like a statement of values or principles, should be "succinct, dignified in tone and diction, focused on the great principles of public service, and intended to endure."[xiii] Separating the *Code of Conduct* from the Charter would facilitate this. The Charter should make only brief reference to related but lengthy expository documents such as the *Guide for Ministers and Ministers of State and Guidance for Deputy Ministers*. Ideally, these and other pertinent documents should reference the Charter, since it would contain the principles and values underpinning their content. This harmonization of official documents would provide a clear, comprehensive and coherent picture of the values and ethical standards to which public servants should aspire. The Charter should have, at least in part, an aspirational and inspirational tone that captures the essence of what public service is all about in Canada's parliamentary democracy. Over time, this approach would help to promote a public service culture that encourages "right-doing" and avoids wrongdoing. The Charter should, however, be combined with strong disclosure legislation that discourages and, when necessary, punishes wrongdoing.

Taken together, disclosure legislation and the Charter will promote the two major forms of public service accountability identified in the scholarly literature. Disclosure legislation will promote formal accountability in the sense of prescribing rules of right conduct. The Charter will foster personal or psychological accountability in the sense of an internalized commitment to do the right thing. As Henry Mintzberg has observed, "[t]he best accountability systems recognize … that 'control is normative… rooted in values and beliefs.'"[7]

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[57] Government of Canada, Working Group on the Disclosure of Wrongdoing, *Report*, January 29, 2004, p. 30. Emphasis added.

[58] Ibid.

[59] Canada, House of Commons, Standing Committee on Government Operations and Estimates, *Evidence*, April 29, 2004, http://www.parl.gc.ca/committee/CommitteePublication.aspx?SourceId=81460.

[60] Queensland, *Public Service Charter*. http://www.opsme.qld.gov.au/pubs/charter.htm.

[61] Canada, *A Strong Foundation*, p. 60.

[62] Canada, Privy Council Office, *Governing Responsibly: A Guide for Ministers and Ministers of State*, December 2003, http://www.pco-bcp. gc.ca.

[63] Canada, Privy Council Office, *Guidance for Deputy Ministers*, June 20, 2003, http://www.pco-bcp. gc.ca/.

[64] Canada, Privy Council Office, *Governing Responsibly: A Guide for Ministers and Ministers of State*, p. 9.

[65] Ibid., p. ii.

[66] *A Strong Foundation*, p. 61.

[67] "Managing Government: Governing Management," *Harvard Business Review*, May-June 1996, p. 81.

TWO CHALLENGES IN ADMINISTRATION OF THE *ACCESS TO INFORMATION ACT*

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1 Two Challenges: Adversarialism and Scope

Canada's *Access to Information Act* (ATIA) came into effect in 1983.[1] The law recognizes the right of Canadians to obtain information[2] from government institutions. It establishes the procedures that must be followed in processing a request for information, including deadlines for response, and enumerates the conditions under which institutions are justified in withholding information. The law also created a new authority, the Information Commissioner, to investigate complaints about non-compliance with its requirements. If the Commissioner decides that a government institution had improperly denied a request for information but the institution continues to balk at disclosure, a remedy can be pursued in the Federal Court of Canada.

Before adoption, it was anticipated that federal institutions might receive about 100,000 requests for information under the ATIA every year.[3] This was a substantial over-estimate of demand. Although the volume of requests has increased by about seven percent per year, by 2004 the total number received was still only 25,232 (Chart 1). This total comprises several separate "information streams." The largest stream consists of requests from businesses, typically seeking information about inspection, regulation and licensing activities, or about governmental procurement of goods and services (Table 1). The "information stream" generated by media requests is smaller and quite distinct. The plurality of these requests seek information about policy development and research, are more likely to receive broad public attention, and are almost always believed by officials to pose political risks for the Government. A similarly small but sensitive category of requests are those filed by Opposition political parties. The volume is difficult to gauge, because federal institutions do not distinguish such "partisan" requests in public reports (although they do internally). Perhaps five to ten percent of all ATIA requests are partisan, although in some institutions the proportion can be substantially higher (Table 2).

By adopting the ATIA, Canada put itself in the vanguard of an international movement. Before 1982, only five other countries had adopted similar laws; today, the total exceeds 60.[4] In the intervening years, Canada was often looked to as a model of good practice, and with justification. Canada had taken the implementation of the law seriously, while many other countries did not. It created special offices to manage the inflow of requests, staffed these offices with trained professionals, and developed formal procedures to encourage prompt processing of requests. At the same time, the Information Commissioner provided an easily accessible remedy in cases of maladministration. In many respects, Canadian practice is superior to practice under the U.S. *Freedom of Information Act* (FOIA), although the popular conception is often the reverse, and also superior to emerging practice under the more recently drafted UK FOIA.[5]

However, the Canadian law is not without its problems. Indeed, it might be said to be in the vanguard in a second sense — as an illustration of difficulties that beset a mature access regime. Two of these difficulties have been vividly illustrated by the controversy surrounding the Sponsorship Program. One is the problem of adversarialism in the administration of the ATIA. Advocates of disclosure laws have underestimated the extent to which the conflict over government records is often precisely that—a *conflict* precipitated by the clash of sharply opposed interests. Disclosure laws regulate this conflict, and aim to change the terms of engagement in favour of non-governmental actors; but they cannot bring an end to conflict itself. On the contrary, experience suggests that government officials and non-governmental actors become more adept in developing strategies that exploit or blunt the opportunities created by the law. There is no guarantee, of course, that the balance of forces will be preserved over time; one side may prove more skilled at developing new strategies than the other. Evidence suggests that federal institutions have developed techniques for managing politically sensitive requests which now undercut basic principles of the ATIA.

The second difficulty with the ATIA is tangentially related to the first. A longstanding difficulty with the ATIA has been its failure to include many key federal institutions. For many years, the difficulty centred on the exclusion of Crown Corporations; more recently, the problem has extended to include government contractors and a range of quasi-governmental entities that perform critical public functions. These entities have not been created with the intention of evading the ATIA. On the other hand, the failure to include newly-created entities under the law — and the continued resistance to demands for inclusion of Crown Corporations — is in part a technique for resisting the impositions of the ATIA, rationalized internally by the sense of the unfairness of the "rules of engagement" embedded in the law. The emphasis on so-called "alternative modes of service delivery" is unlikely to abate, and the failure to reform the ATIA to account for these new modes would cause the law to have ever-diminishing significance.

2 Evidence of Adversarialism

The ATIA was launched with great expectations about its effect on the shape of Canadian governance. "This legislation," predicted Justice Minister Francis Fox in 1980, "will, over time, become one of the cornerstones of Canadian democracy." Fox anticipated that the law would "bring about a very major change of thinking within government:"

> Simply put, the bill reverses the present situation whereby access to information is a matter of government discretion. Under this legislation, access to information becomes a matter of public right, with the burden of proof on the Government to establish that information need not be released.[6]

The expectation that the ATIA could produce a "major change of thinking" about the release of information might be said to typify the idealists' view of what can be achieved by a disclosure law. The Commission of Inquiry into the Sponsorship Program and Advertising Activities investigation provides evidence that, almost a quarter century later, this "major change of thinking" has not occurred. On the contrary, there is evidence that the problems of ATIA administration observed in Public Works and Government Services Canada (PWGSC) are typical of a government-wide pattern of resistance to the requirements of the ATIA.

2.1

Procedures for Sensitive Requests

One mode of resistance has been the development of sophisticated procedures within federal institutions for managing politically sensitive requests for information. These practices have been described by Ontario's Information Commissioner (who has witnessed the emergence of similar practices within provincial government) as "contentious issues management" procedures.[7] These procedures are not easily observed; indeed, for many years their existence was not widely known outside government. Yet they clearly have a significant effect in defining what the "right to information" means in practice. Elsewhere, I have argued that they constitute part of a "hidden law" on access to information.[8]

Within PWGSC, the practice of isolating sensitive requests was highly routinized, and described in a flow chart for the aid of departmental staff. (The flow chart for the most sensitive requests, presented in evidence to the Commission, is reproduced in Chart 2.) Every week, a list of newly received ATIA requests would be sent to the Minister's office and the Department's Communications Branch. In a weekly meeting, ministerial aides and communications staff would meet with ATIA staff to review the list and identify "interesting" requests.[9] An "interesting" request was "one where media attention had been paid to the issue or there is a potential for the Minister to be asked questions before the House [of Commons]."[10] Requests from journalists or Opposition parties were routinely classified as "interesting."[11] "Interesting" requests were tagged electronically in the tracking system used to manage the workflow of the ATIA office.[12] This made it easier to generate lists of sensitive requests for oversight at a later date.

Especially interesting requests required special handling by communications staff, whose task was to prepare a media strategy to anticipate difficulties following disclosure of information, and also review by ministerial staff before release. "We lost control…of the process once Communications had it in their process," the Department's ATIA Coordinator, Anita Lloyd, told the Commission:

> [O]nce [the ATIA office] has completed the processing of the file we would send a package to Communications Branch…. [T]hen they would circulate it to the [office whose documents had been requested] for media lines, or approval of media lines they had prepared. They would then circulate it to the deputy's office and the Minister's Office. When that was done we would get a coversheet back—it was a coversheet for their media lines—and that would be our notification that we could make the release.[13]

This process of review often produced significant delays in responding to requests: "Often we found that it would take about 20 days before we finally got the signoff from the Minister's Office so that we can make a release."[14]

These procedures are not unique to PWGSC. Documents released in response to ATIA requests filed with other government departments in 2003 show that several major federal institutions have adopted essentially the same routines. In Citizenship and Immigration Canada (CIC), for example, the ATIA office conducted (at the time the documents were released) a "risk assessment" of incoming requests to identify those that might be used "in a public setting to attack the Minister or the Department." There was a presumption of sensitivity for requests filed by journalists and representatives of Opposition parties. A weekly inventory of such requests was prepared for review by ministerial and communications staff. Especially problematic requests were "amberlighted," a designation which triggered the production of a communications strategy and final review by ministerial staff.

Other departments also use the "amberlight" designation. In the Privy Council Office (PCO), for example, these especially difficult cases are known as "red files." According to the procedures manual for PCO's ATIA office:

> Approximately once a week the [Office of the Prime Minister] is provided with a list of newly received requests. If they wish to see the release package of any requests they notify the [ATIA] Coordinator who passes on the information to the officer handling the request.

A check of PCO's caseload in October 2003 suggested that about one-third of its caseload had been tagged as "red files;" the majority of these were requests made by journalists or political parties.[15]

These institution-specific routines are complemented by government-wide oversight practices. PWGSC operates, on behalf of the Treasury Board Secretariat (TBS), a government-wide database known as the Coordination of Access to Information Requests System (CAIRS). TBS policy requires that institutions enter information about incoming ATIA requests into CAIRS within one day of receipt. The data on incoming requests that is entered into CAIRS again includes the occupational code—such as "Media" or "Parliament"—of the requester. ATIA offices in all federal institutions are able to search the CAIRS database by several criteria, including occupation of requester.[16] Evidence suggests that the search capacity of the software is used principally by the Treasury Board Secretariat and the Privy Council Office.[17]

CAIRS has been described as a tool to "facilitate the coordination of responding to requests with common themes" by federal institutions. However, reports generated from CAIRS might also be used by communications staff within PCO to guide their own oversight of politically sensitive requests. In 2002, a former director of research for the Liberal Party caucus complained that the PCO's "Communications Co-ordination Group" (CCG) had become:

> [an] egregious example of bureaucratic politicization.... The CCG...is made up of the top Liberal functionaries from ministers' personal staff, along with several of the PMO senior staff, and the top communications bureaucrats from the supposedly non-partisan Privy Council Office.... While the CCG's mandate is supposedly to 'co-ordinate' the Government message, in practice much of the committee's time each week is taken up discussing ways to delay or thwart access-to-information requests.[18]

A senior PCO official conceded in a 2003 *Toronto Star* report that PCO communications staff actively manage the Government's response to sensitive requests received throughout government, to ensure that "the department releasing the information is prepared to essentially handle any fallout."[19] For example, PCO communications staff insisted on reviewing responses to requests relating to the "grants and contributions" scandal of 2000.[20] "When Privy Council Office says they want to see a release package," a communications officer explained in an internal email released by Citizenship and Immigration Canada in 2003, "I am not at liberty to do anything but what they ask." The head of CIC's ATIA office agreed: "A request from PCO Comm is essentially a 'do it' for CIC."[21]

The problem of delay caused by the special procedures for sensitive requests noted in the testimony of Anita Lloyd appears to be commonplace across government. An econometric study of processing time for 2,120 requests completed by Human Resources and Development Canada (HRDC) over three years (1999 to 2001) found that media and partisan requests took an additional three weeks for processing, even after other variables such as the size of the request and type of information requested were taken into account. The probability that processing times would exceed statutory deadlines also increased for media and party requests.[22] A subsequent and larger study of processing patterns for 25,806 ATIA requests completed by eight federal institutions between 2000 and 2002 found similar delays for media or party requests in six of these institutions. In Citizenship and Immigration Canada, for example, media requests required an additional 48 days of processing time, and party requests an additional 34 days. Again, the processing times for such requests were also more likely to exceed statutory response times.[23]

Such delays suggest that a basic principle of the ATIA is widely and routinely flouted by federal institutions. The ATIA is supposed to respect the rule of equal treatment: a presumption that requests for information will be treated similarly, without regard to the profession of the requester or the purpose for which the information is sought. "The overriding principle," argue McNairn and Woodbury, is "that the purpose for which information is sought is irrelevant."[24] The 2002 Report of the ATIA Review Task Force made the same point:

> Coordinators, or other officials with delegated authority, are administrative decision-makers when they decide on a right conferred by the Act.... [T]heir decision has to be made fairly and without bias. Neither decisions on disclosure nor decisions on the timing of disclosure may be influenced by the identity or profession of the requester, any previous interactions with the requester, or the intended or potential use of the information.[25]

A TBS study completed in 2001 also emphasizes that, "It would be a substantial change in the principles of the Act to make the identity of the requester or the purpose of the request a relevant consideration" in processing requests for information.[26] Yet, as a matter of practice, it is clear that the profession of the requester and the purpose for which information is sought are relevant considerations. There is an operating presumption that media and party requests should be regarded as sensitive and subjected to distinct procedures that often lead to lengthened processing time and a decreased probability of response within statutory deadlines.

Whether these requests are also prone to less fulsome disclosure decisions is more difficult to determine. There is no neat way of undertaking a statistical analysis of this question. The key issue is not whether a Minister's Office uses the final stage of the process — the review of the proposed disclosure package — as an opportunity to push for more restrictive disclosure decisions. The deeper problem may be that the whole process may be permeated with an awareness that the Minister's Office has a special interest in the file. The office which holds the records — perhaps led by a civil servant four or five levels below the Deputy Minister — is told within days of a request's arrival that it is regarded as sensitive by ministerial staff. Over the next months, frontline officials and the ATIA office may engage repeatedly with communications staff, who may themselves raise questions about the boundaries of disclosure. It would be surprising if ministerial concerns had not been fully anticipated well before the disclosure package went to the Minister's Office for final review.

2.2

Disclosure of Identities

In addition to these "contentious issues management procedures," there are other ways in which officials attempt to manage the political risks posed by ATIA requests. For example, they may attempt to learn more about the dimensions of the risk by gleaning information about the individual or group that made the request. In testimony before the Commission, Isabelle Roy stated that she had, as a public servant working within PWGSC's Communication Coordination Services Branch, learned the identity of a journalist (Daniel Leblanc, of the *Globe and Mail*) who had filed requests for information regarding the Sponsorship Program.[77]

Such a disclosure is regarded as a violation of the principles of the *Privacy Act*, but it is not unusual for ATIA offices to face pressure to reveal the identity of individuals or groups filing sensitive requests. In May 2000, the Information Commissioner reported that the ATIA office of the Department of National Defence had routinely provided the names of media or party requesters to ministerial staff, in violation of privacy principles. Another of the Commissioner's ongoing investigations in 2000 centred on an allegation that the identity of a requester had been improperly disclosed within the PCO.[38] A year later, senior officials attempted to persuade the *Access to Information Act* Review Task Force that "true transparency" would allow the disclosure of requesters' names within government departments.[39]

In 2001, the Information Commissioner recommended a statutory amendment that would affirm the obligation of ATIA staff to maintain the confidentiality of the names of requesters.[40] However, the question of confidentiality may not hinge on the disclosure of names alone. Even when names are not revealed, it may be possible for identities to be inferred as a result of the practice of distributing the occupation of the requester. The number of journalists who actively use the ATIA is small, and the number who report on specific topics is smaller still. It is probably easy for an experienced communications officer to guess the identity of the journalist who has made a particular request if the occupation of the requester is made clear. The routine dissemination of occupational details across government may therefore result in a constructive violation of privacy. Government officials sometimes invoke this kind of argument to justify the withholding of information under the ATIA on privacy grounds. It is known as the "mosaic effect:" "a term used to describe the situation where seemingly innocuous information is linked with other (publicly available) information to yield information that is not innocuous."[41]

2.3

Pressure on ATIA Officials

Concern about the political damage that may be done by disclosure of official records may also drive officials to put other sorts of pressure on ATIA officials. During the Commission's hearings, evidence was given of the attempt by officials within PWGSC to persuade ATIA staff that Mr. Leblanc's request should be interpreted restrictively or, later, that ATIA staff should attempt to lead Mr. Leblanc into accepting a narrower definition of his ATIA request that would exclude especially sensitive information about the Sponsorship Program. Senior officials were attempting, as Anita Lloyd said, to "manage the issue," but these efforts struck Ms. Lloyd and other ATIA staff as unethical. "There were quite a few meetings on this," said Ms. Lloyd, who consulted a lawyer three times for advice on how to respond to the internal pressures. Ms. Lloyd called the circumstances unprecedented in her years in ATIA administration.[42]

It is difficult for observers outside government to know how intense the pressure on ATIA professionals may become, but there is no doubt that ATIA staff *are* subject to continuing pressure from other officials to adopt restrictive understandings of an institution's obligations under the law. Only a few years after the law's adoption, a TBS survey found that many ATIA coordinators felt significant cross-pressures between their obligations under the law and career considerations within their department.[43] Another study found that coordinators were the "meat in the sandwich" of the ATIA system.[44] More recent studies show that these cross-pressures continue to operate. In 2002, an internal task force appointed to review the ATIA reported that it had a "number of very frank discussions" in which coordinators "talked about the stress involved in dealing with sensitive files and difficult requests."[45] Some coordinators "deplored a perceived lack of accountability for compliance with the Act in some program areas and perceived lack of commitment to the spirit of the Act by some managers at all levels, including senior management."[46]

2.4

Problems in Record-keeping

The political risks posed by ATIA may also be managed by manipulating the stock of government records itself. Evidence presented before the Commission has illustrated two ways in which this might be done. The first is by the decision not to record potentially controversial information at all. "We kept minimum information on the file," Mr. Charles Guité told the Standing Committee on Public Accounts in April 2004, while testifying on the evolution of the Sponsorship Program, "in case of an access to information request." The metaphor employed to rationalize this decision was telling:

> [T]here was a discussion around the table during the referendum year, 1994-95, when I worked very closely with the FPRO and the Privy Council.... We sat around the table as a committee and made the decision that the less we have on file, the better. The reason for that was in case somebody made an access to information request. I think, as I said back in 2002, *a good general doesn't give his plans of attack to the opposition.*[17]

Later, PWGSC officials developed another tactic to deal with ATIA requests regarding the Sponsorship Program. A set of expenditure guidelines were drafted with the expectation that they would be released to requesters and encourage an impression of bureaucratic regularity within the Program. The guidelines did not have operational significance; rather, they had "cosmetic values and purposes."[18]

Concern that the ATIA has caused deterioration in the quality of record-keeping within federal institutions is not new. Indeed, Canada's Information Commissioner has argued that the "troubling shift...to an oral culture" within senior levels of the public service constitutes one of the main challenges to the effectiveness of the ATIA.[19] It should be said, however, that the dimensions and causes of the problem are not well established. Research on changes in record-keeping since the adoption of the ATIA is not extensive, and the conclusions that are drawn about the effect of disclosure requirements are mixed.[40] Factors other than the ATIA have also played an important role in the decline of record-keeping — such as cutbacks in administrative budgets and the general decline in the formality of decision-making which has been evidenced in some advanced democracies.[41] The effect of new information technologies — such as email and electronic database capabilities — may actually be to substantially broaden the size of the "official record."[42]

It is also difficult to know what might be done to remedy a decline in proper record-keeping. The Information Commissioner has suggested the need for legislation that would create "a duty to create such records as are necessary to document, adequately and properly, Government's functions, policies, decisions, procedures, and transactions."[43] Many jurisdictions already acknowledge narrowly-bounded "duties to document" — for example, by requiring the creation of records that describe a department's organization, the expenditure of public funds, or reasons for official decisions. As Canadian officials have noted, however, a more general duty encompassing, for example, a duty to describe internal policy deliberations, would be difficult to enforce.[44]

The more serious problem of destruction or manipulation of government records in an effort to subvert disclosure requirements appears to be less common, but not unknown, in Canada. A decade ago, investigations concluded that officials had destroyed tape recordings and transcripts of meetings in which public servants debated how to manage threats to public safety posed by contamination of the blood supply by HIV and Hepatitis C, a few days after receiving an ATIA request for the records.[45] In 1997, the Commission of Inquiry into the Deployment of Canadian Forces to Somalia concluded that National Defence officials had altered and attempted to destroy documents relating to the misconduct of Canadian Forces in Somalia, documents which had been sought by journalists under the ATIA and by the Inquiry itself.[46] In 1998, Parliament amended the ATIA to make it an offence for officials to destroy, falsify or conceal a record, or "make a false record," in an effort to deny a right of access under the ATIA.[47]

3 Reasons for Adversarialism

The problems in administration of the *Access to Information Act* (ATIA) which have been evidenced during the controversy over the Sponsorship Program are not *sui generis*. Rather, they are particular manifestations of more general problems in ATIA administration. These more general problems have arisen as federal officials have attempted to find ways of minimizing what I have elsewhere called the "disruptive potential" of the ATIA. In deploying these various tactics for dealing with the political risks posed by the ATIA — special procedures, pressure to disclose requesters' identities, more general pressure on ATIA coordinators, or manipulation of the official record — officials have evinced an adversarial attitude toward the law. They have regarded the law as a threat which must be resisted or managed. In this section, I wish to make the point that this attitude of adversarialism can be, and is, rationalized by federal officials. That is, there are reasons which are evoked to justify this attitude towards the law, some of which have merit, and all of which must be understood if we wish to make the law work effectively in practice.

3.1

The Nature of Parliamentary Politics

One obvious defence of adversarialism rests in the nature of parliamentary politics. Partisan requests are often filed with the hope that they may produce information that will compromise the Government's political position; similarly, stories generated by media inquiries may be used by Opposition parties for the same purpose. Ministers and their staff naturally argue that it is unfair to deny them the opportunity to anticipate how they may be called to account in Parliament and other fora.

"What we are talking about is power—political power," said Joe Clark, then leader of the Opposition Conservatives, in 1978.[48] Clark made the observation as part of an argument in favour of broader dissemination of information—and thus of political influence—but the statement nevertheless conveys the hard realities that underlie the day-to-day administration of the ATIA. The same sentiment was conveyed in the 1977 Green Paper on Public Access to Government Documents. Secrecy, the discussion paper said, was partly rooted in the adversarial nature of party politics:

> Many of our social institutions proceed on an adversarial basis. Our court system, for example, is based on the belief that justice will be served by the clash of advocates presenting their case as strongly as possible. So, too, our political system is an adversarial process, based on the belief that the public interest will be served by both government and opposition parties presenting their views to public judgment as ably as they can. The effectiveness of this advocacy depends, at least to some extent, on the ability of parties to concert their plans in confidential discussions. *Government and opposition are a little like football teams* who, in the huddle, prepare their action out of earshot.[49]

Whether the metaphor is drawn from sports or (as in the case of Mr. Guité's testimony before the Public Accounts Committee) the military, the inference is the same: The law is being used by actors whose aims are hostile to the Government, and a strong defence is consequently justified.

3.2

Changes in Use of the Law

A second factor which may aggravate adversarialism is the rise in number and sophistication of sensitive ATIA requests. An ATIA official engaged in the overhaul of CIC's procedures for managing politically sensitive requests observed in an internal email in 2002 that:

> [ATIA] requests are more probing than they used to be. There are many more of them and their requests frequently involve far more, and more sensitive, records. The result is that ATI is much more complex than it was 10 years ago—more challenging for us and more threatening for government-side politicians.[50]

From the point of view of Government as a whole, this observation is probably correct. It is difficult to measure the growth of partisan requests because these data are not publicly reported. However, it is undoubtedly true that the number of media requests has grown. In its last five years (FY1989 to FY1993), the Conservative Government received a total of 4,823 requests from journalists; in contrast, the Liberal Government received 12,535 media requests in the five years ending in FY2004.[51] Furthermore, there is anecdotal evidence that journalists (and perhaps other requesters) have developed better understanding of bureaucratic routines and the law, enabling them to make more precise and less easily evaded requests. It may also be the case that partisans and journalists are more likely to "swarm" a department with ATIA requests once the department is affected by controversy, causing a quick surge in politically sensitive requests. For example, Human Resources and Development Canada (HRDC) saw the number of ATIA requests from journalists alone jump from 36 in 1999 to 199 the next year, following the "grants and contributions" controversy.

3.3

More Complex Governing Environment

Resistance to the requirements of the ATIA is also driven by broader concerns about the erosion of government's ability to govern effectively. This concern about the decline of "governability" is not entirely new or limited to Canadian policymakers.[52] However, there are several reasons why concern for "governability" has increased over the last decade. On one hand, policymakers perceive a decline in authority that is tied to processes of globalization and tighter fiscal constraints. On the other hand, policymakers observe a surrounding environment that seems more complex and turbulent. In most advanced democracies, the number of interest groups has expanded, and so too have the number of external checks (such as auditors, commissioners and ombudsmen) with authority to scrutinize the work of government.

In Canada, Professor Donald Savoie has observed that senior civil servants "have been confronting a work environment analogous to a perfect storm. They might as well be working in a glass house, given access-to-information legislation, several oversight bodies policing their work, and more aggressive media."[53] A similar anxiety was expressed in a 1996 Organization for Economic Co-operation and Development (OECD) report, which observed that governments faced "intense pressure from citizens, transmitted or provoked by the media, and demanding rapid responses." Mechanisms for improving responsiveness—"policies of consultation with the public, freedom of information, and transparency"—could be abused, the OECD report suggested, blocking constructive governmental action. The report concluded that it was important to resist "excessive pressure" from the media and pressure groups: Governments needed "to pursue more active communication policies, to keep control of their agendas and not just react passively to the pressure of events."[54]

For those concerned with the decline of "governability," the changing role of the media is often a matter of special concern. The structure of the media has clearly changed. Traditional outlets have been undercut by new technologies, so that there are now more potential outlets for news, competing against each other in an accelerated news cycle. We live in the Blackberry age, and this naturally fuels official anxiety about the loss of control over information flows. Added to these structural changes is a perceived decline in the *attitude* of the media towards governmental authority. In this view, as the Archbishop of Canterbury has recently argued, journalists too often begin by assuming that:

> [T]he question to ask almost anyone…is the immortal: "Why is this bastard lying to me?"…[T]he effect is to treat every kind of reticence as malign.… Exposing what is for any reason concealed becomes an end in itself, because the underlying reason for all concealment is bound to be corrupt and mystificatory.… [Politics is] reduced to a battleground where information is dragged out of reluctant and secretive powerholders.[35]

In Canada, this general concern about "governability" is heightened by the ongoing concern about constitutional issues. This is evidenced in the Sponsorship Program controversy itself: Mr. Guité recalled that he and other officials had made their decision to avoid record-keeping "during the referendum year, 1994-95,"[36] when the threat to national unity seemed especially sharp. This concern was not new or peculiar to the Liberal Government. Between 1991 and 1993, the Conservative Government attempted to resist the release of public opinion polls on constitutional matters to journalists by arguing that disclosure could undermine "the very existence of the country as we have known it." The Federal Court of Canada ruled in favour of the journalists.[37]

3.4

Perceptions of Unfairness

A final argument that is invoked to justify official adversarialism is a sense that the law itself is unfair in its design, by failing to block requests which serve no legitimate interest or which draw excessively on public resources. It is indeed the case that disclosure laws, like any other laws, may be abused. In rare cases, officials may be subjected to requests for information whose aim is not to obtain information essential for the pursuit of some important purpose, but rather to harass government workers and obstruct government operations. Such requests are uncommon, a committee of senior officials told the ATIA Review Task Force in 2001, but "give access a bad name."[58] The ATIA does not give federal institutions explicit authority to disregard such requests, as do some provincial laws. Ontario's *Freedom of Information and Protection of Privacy Act*, for example, denies the right to information if "the head [of an institution] is of the opinion on reasonable grounds that the request for access is frivolous or vexatious."[59]

More often, a request may serve a legitimate purpose but nonetheless draw disproportionately on public resources. The cost of processing a single ATIA request is not negligible. In 2000, a Treasury Board Secretariat study concluded that the annual cost of administering the ATIA was $24.9 million, or about $1,740 for each information request received that year.[60] An individual may activate a request by paying only five dollars; certain additional fees may eventually be payable, but these will reflect only a fraction of the total cost of processing the request. There is, it must be made clear, a strong case for public subsidization of the ATIA system. However, many officials believe that the subsidy is too lavish, or inappropriately designed, and that requesters are not adequately deterred from making "broad, unfocussed requests and fishing expeditions."[61] This also undermines respect for the law.

4 Responding to Adversarialism

In canvassing these defences of adversarialism, I have not meant to suggest that they are necessarily complete or persuasive. These complaints must be weighed against compelling arguments in favour of transparency, and do not justify *sub rosa* practices which have the effect of undercutting rights granted by the *Access to Information Act* (ATIA) itself. Nevertheless, it is important to recognize that the arguments deployed by officials in defence of current practices are substantial; this implies that the practices themselves are unlikely to be easily changed.

4.1

A Realist's View of the ATIA

This suggests the need for a more realistic perspective about the role of the law. Disclosure laws like the ATIA have often been promoted by policymakers as tools for overturning the "culture of secrecy" within governments, putting in its place a "culture of openness" — a culture, as Australian High Court Justice Michael Kirby said in 1997, "which asks not why *should* the individual have the information sought, but rather why the individual *should not*."[62] Earlier, I called this the idealist's view of disclosure law. It is a widely held view. Shortly after adoption of the Irish *Freedom of Information Act* (FOIA) in 1997, for example, Information Commissioner Kevin Murphy observed:

> [The law] has been variously described as heralding "the end of the culture of public service secrecy" and as a "radical departure" into a brave new world of public service openness and transparency. I know that media people…may view such a statement as nothing more than hyperbole; nevertheless, it is a fact that the enactment of the FOI Act does mark a radical departure from one style or culture of public service to another.[63]

The British FOIA adopted in 2000 has also been promoted as a tool to break down the "traditional culture of secrecy" and construct "a new culture of openness."[64]

In practice, however, the "culture of openness" has proved elusive. The 40th anniversary of the American FOIA, in 2006, will not be marked by a celebration of culture change, but by continued controversy over the Bush administration's efforts to narrow its obligations under the law.[65] Nor is there evidence of profound shifts in bureaucratic culture in Commonwealth jurisdictions that adopted similar laws in the late 1970s and early 1980s. In May 2005, Information Commissioner John Reid marked the completion of his term by lamenting the "stubborn persistence of a culture of secrecy" within the Canadian Government.[66] In 2002, the Government's own Access to Information Task Force reached a similar conclusion about the durability of old values in federal institutions.[67]

This is not to say that disclosure laws have failed as tools for obtaining information that is held by government institutions. On the contrary, government departments have often been compelled to disclose sensitive information to journalists, Opposition parties or non-governmental organizations which might never have been accessible previously. In many cases, institutions have developed new procedures for routine disclosure of information that is frequently requested under the law. Governments have become more open, but this does not mean that they have acquired a "culture of openness." It means only that the rules that govern the conflict over information have shifted in favour of openness, and that government officials (as a rule) recognize their ultimate obligation to submit to the rule of law.

If a "culture of secrecy" persists after two decades, what should we do about it? One approach, favoured in the recent report of the ATI Task Force, is a renewed effort to create a "culture of access."[68] Another and perhaps more realistic view is one that recognizes that the "culture of openness" is probably unattainable. In certain areas, conflict over information will persist — and may actually intensify, either because of changes in the broader governance context or simply because the protagonists have become more adept in using the law and developing techniques to blunt its impact. The aim of reform in this case is not to change organizational culture, or to deny the reality of conflict, but to construct rules of engagement that are transparent, perceived as fair, and appropriately enforced.

4.2

Transparent Procedures for Sensitive Requests

By these standards, one clear area for reform relates to the special procedures for sensitive requests that have been established by PWGSC and several other departments. Here, a basic principle of transparency is not respected. Institutions rely on rules for handling ATIA requests, rules which clearly affect the substance of an individual's access rights but are generally hidden from public view. It should not require a public inquiry, or an ATIA request, to determine what these rules are. It ought to be standard procedure for each institution to publish its internal procedures for handling requests, including any procedures for special treatment of sensitive requests, on the institution's website. The published procedures should be complete — an institution should not be permitted to rely on additional, non-public processing rules.

There is also a problem of unfairness in the current design of ATIA procedures in major institutions, which routinely segregate partisan and media requests for processing under distinct rules that produce less favourable outcomes to those requesters (at least by the measure of response time, which is often critically important to media and partisan requesters). It may well be the case that institutions are entitled to anticipate the consequences of disclosure, but there is nothing in the law that permits institutions to achieve this goal by undermining the principle of equal treatment.

The challenge lies in deciding how practices should be redesigned to ensure that the principle of equal treatment is respected. It is unreasonable to suggest that institutions should simply forgo anticipating the communications implications of sensitive ATIA requests. The task, therefore, is to find ways of ensuring that this work does not undercut the right to access. One approach is to encourage the Information Commissioner to monitor the handling of sensitive requests as a class, but this is contingent on proper resourcing of the Commissioner's office, as I note below. Another approach would be to make use of special procedures contingent on notice to the requester. This is not an onerous requirement—it could be noted in the request acknowledgment or extension letter, and puts the requester on notice to watch for undue delays that might be attributed to special handling.

4.3

Protecting Identities

Fairness in the handling of ATIA requests also requires stronger rules to ensure that the privacy rights of individuals requesting information are protected. In practice, it is difficult to detect instances in which privacy rights have been violated. One method of discouraging pressure to disclose identities might be to include a provision in the ATIA stating that such disclosures are generally inappropriate. The Information Commissioner recommended the adoption of such language in 2001.[69]

As I noted earlier, however, the routine of disclosing a requester's occupation (for example, as a media requester) could also lead to a constructive violation of privacy. The practice of classifying requests by source was originally intended to improve public understanding of how the ATIA is used, and there is still a strong argument for requiring ATIA offices to classify requests for this purpose. But any purpose that might be served by circulating this information elsewhere within an institution—or across government generally—may be outweighed by privacy risks.

It must be conceded that a bar on the circulation of occupational information has its own limitations. Suppose, for example, that an ATIA officer conducting a "risk assessment" of an incoming request continued to assume that media and partisan requests were presumptively sensitive. The designation of a request as sensitive would therefore be a flag that an incoming request might come from these sources. However, the risk to privacy is diluted in this case; the class of potential requesters is larger, not only because media and partisan requests are mixed, but also because sensitive requests could come from other sources.

4.4
Autonomy of Coordinators

A major difficulty with ensuring fair enforcement of ATIA requirements is that so much of the process takes place away from public view. Requesters cannot see what is being done within an institution, and the Information Commissioner also lacks the resources to track institutional behaviour closely. In practice, the ATIA coordinator plays a key role in ensuring that the rules of the game are followed.

Two steps can be taken to strengthen the understanding that the ATIA Coordinator acts as a guardian of good process. One step, first recommended by the Commons Standing Committee on Justice in 1987, would be to give the role of ATIA Coordinator explicit recognition in the ATIA itself.[70] This recommendation has been endorsed more recently by the Information Commissioner. The aim of this proposal is not to make the Coordinator an advocate of the requester's interests; rather, it would be a formal recognition of the Coordinator's responsibility (in the Commissioner's proposed language) "to respect the letter and purpose of this Act, and to discharge this duty fairly and impartially."[71]

Having said this, there is much to be said for a second step: the formal recognition of a duty to assist individuals who seek to exercise their rights under the ATIA. This is not a radical innovation; a "duty to assist" is included in British Columbia[72] and Alberta[73] law, as well as the new United Kingdom FOIA.[74] British Columbia's law says that institutions "must make every reasonable effort to assist applicants and to respond to each applicant openly, accurately and completely." Federal ATIA coordinators recognize this principle in practice, but statutory language might help to bolster the position of coordinators in cases where they face inappropriate pressure from other parts of their institution.

4.5

Funding of the Commissioner

Steps should also be taken to modify the method of funding the Information Commissioner's office. Currently, the budget for the Commissioner's office is determined by Treasury Board—a Cabinet committee—after representations by the Commissioner's office. This creates an obvious conflict of interest; a Cabinet that is indifferent to the aims of the ATIA can simultaneously flout the law and undercut the Commissioner's ability to investigate the complaints that arise from its indifference.

This may not be a hypothetical concern. In the early 1990s, cutbacks to administrative budgets within many federal institutions caused widespread problems of delay in responding to ATIA requests, which generated a dramatic spike in the number of complaints about noncompliance to the Information Commissioner's office (Chart 3). However the Commissioner's own budget was essentially frozen for five years; as average caseloads increased, so too did the time required for resolving complaints.[75] The Commissioner's eventual effort to use his formal investigative powers to prod senior managers into addressing systemic delays led to a serious deterioration in working relationships between his office and the highest levels of the federal bureaucracy.[76]

Although the delay crisis of the 1990s has now receded, the caseload of the Commissioner's office remains at a historically high level. The

Commissioner recently reported to the House Committee on Access to Information, Privacy and Ethics that his office suffers a "crisis of underfunding:"

> The backlog of incomplete investigations is now at a level which would take all my 23 investigators a full year to dispose of.... Last year, the average time it took to complete an investigation was some nine months—at least six months longer than is reasonably acceptable. The reason is insufficient resources. Every internal efficiency gain has been exploited. We simply do not have enough investigators to do a labour intensive job. As well, my office has no research, policy, training, public education, or communications staff. These we sacrificed as part of the internal search for resources to put towards investigations.[77]

This shortfall in funding undermines the Commissioner's ability to monitor the ATIA system as a whole, perhaps by undertaking special government-wide studies of problematic practices. An alternative funding model is already being considered for the office of the Ethics Commissioner. Under this approach, the Ethics Commissioner will propose a budget to the Speaker of the House of Commons; after review, the budget will be forwarded to Treasury Board to be included, without modification, in the Government's spending proposals.[78] In May 2005, the Committee on Access to Information, Privacy and Ethics endorsed a comparable reform of the funding mechanism for the Information Commissioner and other officers of Parliament.[79]

4.6
Appointment of the Commissioner

Other reforms could also be undertaken as part of an effort to establish an access regime that is generally regarded as fair. One is a reform in the manner by which Information Commissioners are appointed. If the process of requesting information is, in many instances, adversarial, it is important that the Commissioner be universally regarded as a person who is able to serve as a truly independent arbiter. The current method of appointment—by Order in Council, subject to approval of the appointment by resolution of both Houses of Parliament—does not do this. It gives too much discretion to the Government of the day and tends, as a matter of practice, to undermine popular respect for the law.[80]

This was demonstrated in 1998, when the Government made plans to replace outgoing Commissioner John Grace. Initially it was rumored that the Chrétien Government intended to propose a former Deputy Minister of Justice, an idea which was sharply criticized in the press. Eventually, the Government proposed another former Deputy Minister, Mary Gusella, but Ms. Gusella withdrew her name after protests from former Commissioner Grace,[81] editorialists and Opposition legislators. Government and Opposition leaders eventually agreed on John Reid as an agreeable alternative, but the process by which this agreement was reached lacked transparency and was challenged by non-governmental groups. The lingering effect of the controversy was to undermine the legitimacy of the office itself.

There are better alternatives. One model, used in some jurisdictions for appointment of judges, is to establish an independent committee to consider nominations and propose a short list of acceptable candidates. Such a committee might include cross-party and other non-governmental representatives, and perhaps also some provincial Information Commissioners. The committee might solicit applications or simply provide advice in confidence about proposed candidates. There are many different ways in which such a body might work—all of which would result in decisions that are manifestly fairer than those produced by the status quo.

4.7

Stronger Administrative Controls

A well-functioning law also depends on a perception *within* federal institutions that the rules of the game are fair. Respect for the law—and therefore compliance with its requirements—might also be enhanced by providing protections against clear abuses of the law. A bar on "frivolous and vexatious" requests, comparable to the provision already established in Ontario law, ought to be included in the ATIA as well. A modest increase in the application and other fees—perhaps countering the effect of 20 years' inflation—might also serve as a reasonable check against otherwise costly ATIA requests. There is also an argument to be made for limits on requests which impose an extraordinary burden on federal institutions.[57]

The controversy surrounding the Sponsorship Program does not directly involve problems of frivolous, vexatious or voluminous requests. However, it may be that the indifference to statutory requirements which is manifested in the controversy is rationalized on the grounds that the law itself does not balance competing considerations properly, and to the extent that reasonable administrative controls help to improve the perceived reasonableness of the statute, they might help to avoid similar problems of official resistance in the future.

5 The Scope of the Law

An obvious limitation of any disclosure law is its inability to assure a right to information held by institutions that are not subject to the law. This constraint appeared to operate during the Sponsorship Program controversy, which touched entities—such the Canada Post Corporation, VIA Rail Canada and the Old Port of Montreal—not covered by the *Access to Information Act* (ATIA). In fact, one of the longstanding weaknesses of the ATIA has been its restrictive approach to coverage of institutions in which the federal government has an interest. This weakness has been aggravated over the past decade as the Government has experimented with several new modes of "alternative service delivery."

The treatment of Crown Corporations under the ATIA is inconsistent, and longstanding pressures for rationalization of coverage have been resisted by government. Only 28 of 46 Crown Corporations are subject to the law.[83] A 1987 recommendation by the Commons Standing Committee on Justice that the ATIA should cover all Crown Corporations was not accepted by the Government, which promised only to review the matter.[84] In 1996, a committee established to review the activities of Canada Post also recommended that the Corporation's non-competitive activities should be subject to ATIA.[85] In 2002, the ATIA Review Task Force again recommended the inclusion of more Crown Corporations under the law, although in some instances it suggested that new exemptions might need to be added to protect critical interests.[86]

In February 2005, the Government affirmed its willingness to include (through Order in Council) 10 of the excluded Crown Corporations, including the Old Port of Montreal.[87] At the same time, it indicated that seven other Crown Corporations—including Canada Post and VIA Rail—should not be included until the ATIA had been amended to provide stronger exemptions for certain kinds of information held by those entities.[88] In April 2005, the Minister of Justice indicated that legislative action to amend the ATIA in this way would be deferred until the Standing Committee on Access to Information, Privacy and Ethics had completed its review of the ATIA.[89]

A critical issue during this review will be the breadth of the new exemptions which are thought to be required as a prerequisite for inclusion of Crown Corporations such as Canada Post and VIA Rail. The Government appears to contemplate the addition of new exemptions that would permit Corporations to withhold confidential business information, or information received in confidence from other parties, without the obligation to demonstrate a risk of harm from disclosure that is contained in current exemptions.[90] Such exemptions would be inconsistent with the basic logic of disclosure laws—that decisions on the withholding of information should require a weighing of benefits and harms—and would substantially qualify the gains realized by including these Corporations under the law.

The impression that may be conveyed by these years of deliberation is that the extension of disclosure requirements to Crown Corporations is a deeply problematic or technically complicated exercise. This is not the case. Many other countries already take a more expansive view. For example, the United States Postal Service, the Royal Mail, Australia Post and New Zealand Post are all subject to disclosure laws like the ATIA, while Canada Post is not. While the Canadian Broadcasting Corporation is not subject to the ATIA, many other similar organizations—the British Broadcasting Corporation, the Australian Broadcasting Corporation, Television New Zealand, and the Irish broadcaster RTÉ—are covered, with exemptions for journalistic or program material. Some organizations with functions analogous to those of VIA Rail—such as the United States' Amtrak—are also required to comply with national disclosure laws; in this sector, comparison is complicated by differences in the structure of national rail systems.

It must also be emphasized that the inclusion of Crown Corporations would constitute only a partial response to the problem of the ATIA's limited scope. A range of other mechanisms that have recently been relied upon for the delivery of public services must also be accounted for. These include:

- contractors who deliver increasingly large components of work once undertaken by federal institutions;

- many of the federal government's "other corporate interests" (Table 3), such as the air traffic control service, NAV Canada, as well as entities which expend substantial amounts of money provided by the federal government, such as the Canadian Foundation for Innovation; and
- other critical advisory or service delivery bodies created on the initiative of the federal government, but not recognized as federal government corporate interests, such as major airport authorities,[91] the Nuclear Waste Management Organization[92] and Canadian Blood Services.[93]

Also lacking is a clear set of standards for determining when organizations should be included under the ATIA. As the ATIA Task Force observed in 2002:

> The government continues to create organizations intended to achieve a public purpose at some distance from government. The Act may or may not apply to such organizations.... We could not identify an obvious rationale or any apparent criteria that were used in determining which of these organizations should be subject to the Act. It is our view that the current approach is unsatisfactory.... [T]here is a need for a principled approach to coverage under the Act.[94]

Missing as well is some kind of mechanism to ensure that proper consideration is given to the question of whether newly created organizations should be subject to the law. As the Task Force again observed, "there is apparently no formal process within government for ensuring that the Act's application is considered when new institutions are created."[95]

Again, reform of the Act to accommodate new modes of service delivery is not a technically challenging task. For example, New Zealand and Irish laws deem contractor records to be held by the contracting agency, and thus subject to the right of access. Several laws also include formulae which deem a body to be subject to the law if it relies heavily on government financing; is effectively under government control (through board appointments, for example); undertakes a critical public function within the jurisdiction of a government; or holds information the disclosure of which is essential to the protection of a basic citizen interest.[96] Some laws (such as the United Kingdom's *Freedom of Information Act*[97]) articulate criteria but leave it to government discretion to determine whether an entity meeting those criteria should be added to a schedule of institutions covered by the law.

A range of options for dealing with contractors and quasi-governmental entities have now been presented in Canada. The ATIA Review Task Force proposed that the government procurement policy should be amended to ensure a right of access to contractor records, and that the Government should undertake a review of quasi-governmental entities, adding them to the schedule of federal institutions subject to ATIA if:

- Government appoints a majority of board members, provides all of the financing through operations, or owns a controlling interest; or
- the institution performs functions in an area of federal jurisdiction with respect to health and safety, the environment, or economic security; unless
- inclusion would be "incompatible with the organization's structure or mandate."[98]

The Information Commissioner, in contrast, has recommended amendment of the ATIA to assure that federal institutions retain control over all records generated pursuant to service contracts. An amended ATIA would also create a *mandatory* obligation for Government to add a new entity to the schedule of covered institutions if it meets any one of six criteria:

- it is funded in whole or in part from parliamentary appropriations or is an administrative component of the institution of Parliament;
- it or its parent is owned (wholly or majority interest) by the Government of Canada;
- it is listed in Schedule I, I.1, II or III of the *Financial Administration Act*;
- it or its parent is directed or managed by one or more persons appointed pursuant to federal statute;
- it performs functions or provides services pursuant to federal statute or regulation; or
- it performs functions or provides services in an area of federal jurisdiction which are essential in the public interest as it relates to health, safety, protection of the environment or economic security.[99]

A key difference between these two approaches is the extent to which the Government is to be trusted to undertake decisions necessary to ensure that the ATIA maintains appropriate coverage. The Task Force is prepared to trust executive discretion, while the Information Commissioner is not. On the other hand, there appears to be broad agreement on the criteria to be used in determining whether entities should be covered, relying on a blend of considerations relating to control, financing, jurisdiction and criticality of function.

In his recent discussion paper, the Justice Minister makes no comment on the treatment of contractor records and expresses no view on the merit of the criteria for including quasi-governmental entities proposed by the Task Force or the Information Commissioner, except to say that any criteria should be related to "stable characteristics of an organization." The Minister favours an approach under which Government retains discretion over the inclusion of entities, but suggests the Government may be amenable to a requirement that it account annually for its decisions.[100]

The emphasis on new modes of service delivery is unlikely to abate. As a consequence, some better method of accommodating these modes within the transparency regime established by the ATIA is necessary; the alternative is acquiescence in the slow erosion of that regime. An explicit policy on the treatment of contractor records is therefore necessary; so, too, is an explicit policy on the treatment of quasi-governmental entities. Furthermore, a policy that is entrenched within the ATIA is preferable to one that relies principally on the good will of the executive. (The apparent indifference of the executive to the effect of restructuring on the functioning of the ATIA over the past 15 years may be the most compelling evidence on this point.) The reforms proposed by the Information Commissioner are consequently preferable to those of the Task Force, although there may well be room for debate about the precise definition of the criteria that should trigger the mandatory obligation to include new entities in the schedule of institutions covered by the law.

6 Conclusion

While the *Access to Information Act* (ATIA) system has its difficulties, and while it may have failed to achieve a "change in culture" within federal institutions, it would be inappropriate to conclude that it is therefore a failed policy. This is far from being the case. Every year, thousands of requests are filed which serve important public purposes: assuring fairness in the treatment of citizens and businesses; promoting better understanding of policy-making within government; and promoting a business environment that is regarded as stable and transparent.

Furthermore, the ATIA provides good value for money, even if particular requests may draw disproportionately on government resources. As I noted earlier, the annual cost of administering the law was about $25 million in 2000; it will have increased significantly since then, because of heightened demand and input costs. Nevertheless, a sense of proportion is needed. The federal government planned to spend $393 million on information activities—including advertising services; public relations and public affairs services; and publishing, printing and exposition services—in fiscal year 2005.[101] The amount of money that is spent on the ATIA—what might be called "uncontrolled" information dissemination—is only a fraction of the total amount that is spent on "controlled" dissemination.

Nevertheless, the ATIA requires reform. This is not surprising; it is a system that is now over two decades old, governed by a law which has never had a comprehensive overhaul. Any such reform must give full consideration to the two issues canvassed in this paper. Adversarialism is an unavoidable feature in the administration of the ATIA, particularly with regard to the roughly four or five thousand requests received annually which are regarded as posing political sensitivities for the Government of the day.[102] The problem of adversarialism must be addressed directly. As I have noted earlier, several simple reforms can be undertaken to provide requesters and officials with assurance that the "rules of the game" are transparent, fair and properly enforced.

The law must also be amended to accommodate the new realities of governance. It is now a commonplace that our old conception of the public sector—in which the public's work was done primarily in government departments staffed by public servants—has become obsolete. The "public sector" has become a more variegated composite of governmental, quasi-governmental and "private" actors, and there is good reason to think that this process of fragmentation will continue. A law which does not properly account for this fundamental change in the structure of governmental institutions will have declining relevance as a tool for providing an assurance of transparency in the performance of public work.

Chart 1: Number of Requests Filed by Source, 1986-2004

Based on data contained in annual reports filed by federal institutions under section 72 of the *Access to Information Act*, and tabulated by Treasury Board Secretariat.

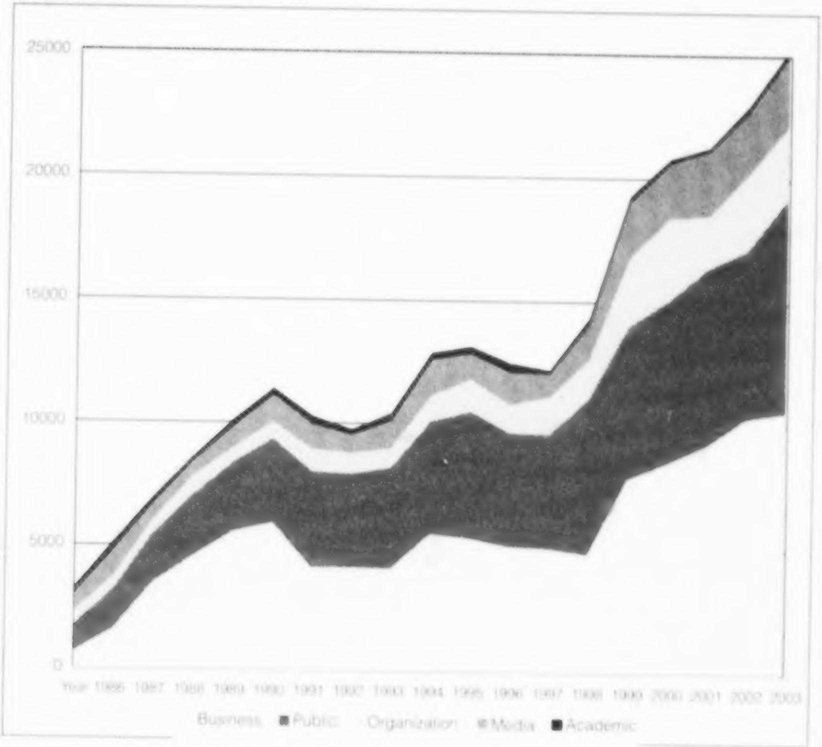

Table 1: Distribution of Requests by Source and Subject-Matter

Based on an analysis of a sample of 663 ATIA requests drawn randomly from a list of requests received by federal institutions and logged in the Coordination of Access to Information Requests System (CAIRS) in 1999.[101]

(a) Summing to 100% by source of request (Business Media, Organization, Other)

	Business	Media	Org.	Other	ALL
Personnel management	1%	3%	4%	11%	5%
Procurement	32%	6%	21%	4%	17%
Budgeting and financial control	7%	12%	15%	12%	11%
Grants and contributions	2%	8%	17%	5%	6%
Inspection, regulation & licensing	37%	13%	6%	14%	21%
Policing, criminal prosecutions & corrections	4%	13%	3%	13%	8%
Research and policy development	5%	24%	21%	8%	11%
Other	12%	21%	14%	32%	20%
ALL	100%	100%	100%	100%	100%

(b) Summing to 100% by subject-matter of request (N=663)

	Business	Media	Org.	Other	ALL
Personnel management	6%	9%	12%	73%	100%
Procurement	67%	5%	20%	8%	100%
Budgeting and financial control	23%	18%	23%	37%	100%
Grants and contributions	12%	19%	43%	26%	100%
Inspection, regulation & licensing	64%	10%	5%	21%	100%
Policing, criminal prosecutions & corrections	17%	26%	6%	52%	100%
Research and policy development	14%	33%	30%	22%	100%
Other	22%	16%	11%	51%	100%
TOTAL	36%	16%	16%	32%	100%

Table 2: Breakdown of Requests by Type in Nine Institutions

Several departments operate ATIA tracking systems which deploy more detailed categorizations of incoming requests than are used in the publicly available reports on ATIA usage that must be provided under section 72 of the ATIA. The following table is based on data extracted from tracking systems for some major federal institutions. Data for HRDC are based on all requests completed by the institution in 1999-2001. For all other institutions, the table is based on all requests completed in 2000-2002. The "Partisan" category includes requests coded as "Parliament" or "Political Party" by each institution. Six institutions used only the category "Political Party" in this period; one (PCO) used only the category "Parliament;" another one (DND) used both. SGC used neither.

Source	HRDC	CCR	CIC	DND	FAI	JUS	PCO	SGC	TC
Academic		0.1%	0.0%	0.6%	2.3%	1.3%	3.1%	3.8%	0.5%
Business	6.6%	35.0%	12.4%	15.9%	5.0%	14.2%	14.2%	0.0%	21.2%
Lawyer	3.3%		40.2%	1.0%	3.1%	7.8%	1.8%	1.3%	14.0%
Media	11.3%	7.5%	1.1%	33.5%	36.5%	19.8%	32.2%	58.2%	25.6%
Organization	8.2%	14.0%	0.7%	0.7%	4.8%	2.1%	3.9%	18.0%	8.0%
Other	30.1%	40.8%	44.9%	44.5%	35.6%	19.3%	20.7%	18.8%	17.4%
Partisan	40.5%	2.6%	0.7%	3.6%	12.7%	35.5%	24.1%		13.3%

Chart 2: Flow Chart for Sensitive Requests Within PWGSC

Three flow charts describing the handling of ATIA requests within PWGSC were presented in evidence before the Commission of Inquiry into the Sponsorship Program and Advertising Activities. One described the process for routine requests, while a second described the process for requests that were "interesting" but did not require preparation for anticipated media queries. This third chart described procedures for "interesting" requests that would require development of "media lines."

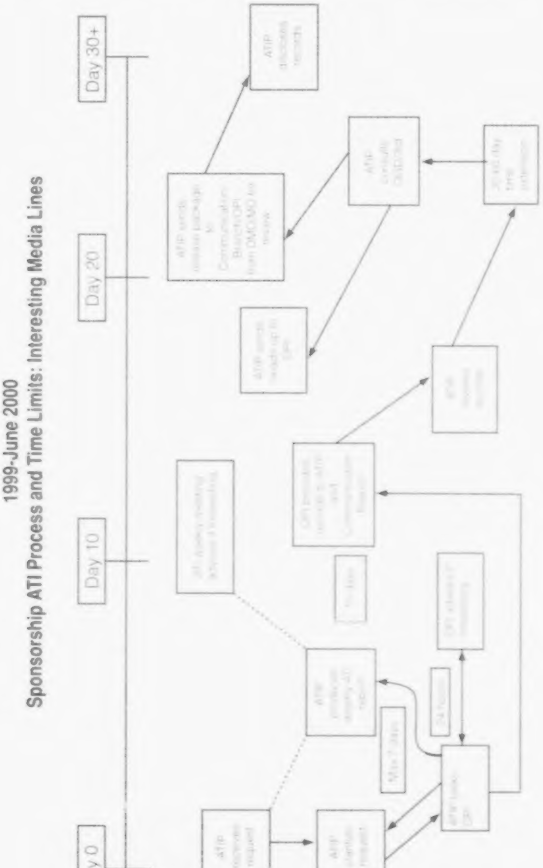
Sponsorship ATI Process and Time Limits: Interesting Media Lines
1999-June 2000
Day 0
Day 10
Day 20
Day 30+
ATIP receives request
ATIP clarifies request
Max 7 days
24 hours
ATIP sends release package to Communications Branch/OPI then DMO/MO for review
ATIP discloses records

Chart 3: OIC Workload and Budget

The following chart shows the following data, with all series normalized so that figures for FY1994 equal 100: (a) total ATIA requests received by federal institutions; (b) complaints received by the Office of the Information Commissioner; (c) OIC personnel (as FTEs), excluding corporate services personnel; and (d) OIC budget, deflated using the Consumer Price Index, excluding the corporate services budget. Figures are drawn from institutions' annual reports under section 72 of the ATIA and from OIC annual reports. CPI data was obtained from Statistics Canada.

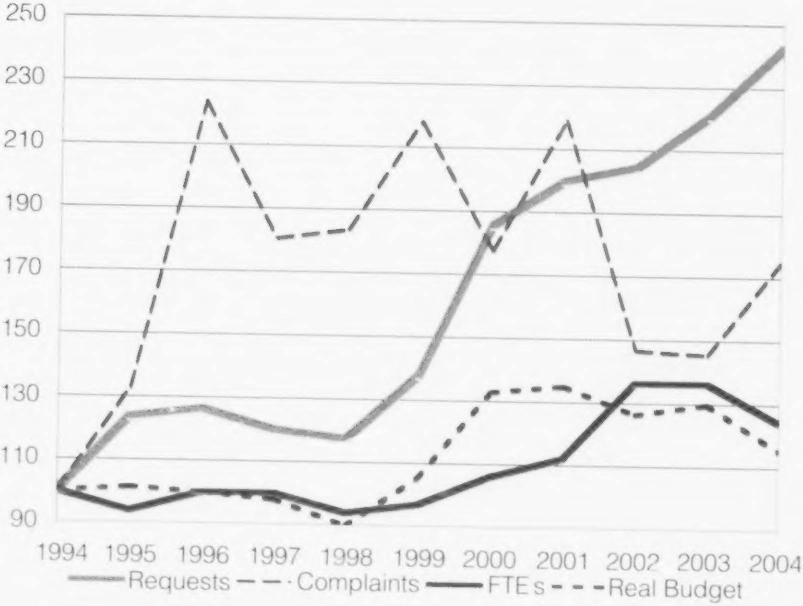

Table 3: Coverage of Crown Corporations and Other Federal Government Corporate Interests[104]

COVERED BY ATIA	NOT COVERED BY ATIA
Parent Crown Corporation	
Atlantic Pilotage Authority Bank of Canada Blue Water Bridge Authority Business Development Bank of Canada Canada Council for the Arts Canada Deposit Insurance Corporation Canada Lands Company Limited Canada Mortgage and Housing Corporation Canadian Air Transport Security Authority Canadian Commercial Corporation Canadian Dairy Commission Corporation Canadian Museum of Civilization Canadian Museum of Nature Canadian Tourism Commission Defence Construction (1951) Limited Farm Credit Canada Freshwater Fish Marketing Corporation Great Lakes Pilotage Authority International Development Research Centre Laurentian Pilotage Authority National Capital Commission Corporation National Gallery of Canada National Museum of Science and Technology Pacific Pilotage Authority Royal Canadian Mint Standards Council of Canada Telefilm Canada The Federal Bridge Corporation Limited	Atomic Energy of Canada Limited Canada Development Investment Corporation Canada Pension Plan Investment Board Canada Post Corporation Canadian Broadcasting Corporation Canadian Race Relations Foundation Cape Breton Development Corporation Enterprise Cape Breton Corporation Export Development Canada Marine Atlantic Inc National Arts Centre Corporation Public Sector Pension Investment Board Queens Quay West Land Corporation Ridley Terminals Inc VIA Rail Canada Inc
Joint or mixed enterprises	
	Lower Churchill Development Corporation North Portage Development Corporation and The Forks Renewal Corporation
Other entities	
Belledune Port Authority Fraser River Port Authority Halifax Port Authority Hamilton Port Authority International Centre for Human Rights and Democratic Development Montreal Port Authority Nanaimo Port Authority North Fraser Port Authority Port Alberni Port Authority Prince Rupert Port Authority Quebec Port Authority Saguenay Port Authority Saint John Port Authority Sept-Îles Port Authority St. John's Port Authority The Jacques-Cartier and Champlain Bridges Incorporated Thunder Bay Port Authority Toronto Port Authority Trois Rivières Port Authority Vancouver Port Authority Windsor Port Authority	Asia-Pacific Foundation of Canada Buffalo and Fort Erie Public Bridge Authority Canada Foundation for Innovation Canada Foundation for Sustainable Development Technology Canada Millennium Scholarship Foundation Canadian Centre on Substance Abuse Canadian International Grains Institute Canadian Livestock Records Corporation Canadian Wheat Board Cape Breton Growth Fund Corporation Nav Canada Old Port of Montreal Corporation Inc Parc Downsview Park Inc Roosevelt Campobello International Park Commission Saint John Harbour Bridge Authority Seaway International Bridge Corporation Limited Vanier Institute of the Family

Endnotes

[1] R.S.C. 1985, c. A-1.

[2] Strictly, the law gives a right of access to *records* in either paper or digital form. See sections 3 and 4(3) of the Act.

[3] John Roberts, "Green Paper on Legislation on Public Access to Government Documents," in *The Complete Annotated Guide to Federal Access to Information*, ed. Michel Drapeau and Marc-Aurèle Racicot (Toronto: Carswell, 2001), 32-33.

[4] David Banisar, *Freedom of Information and Access to Government Records around the World* (Washington, DC: freedominfo.org, May 2004 [Accessed May 31, 2004]), available from http://www.freedominfo.org/survey.htm.

[5] These observations are based on experience in making requests under all three laws.

[6] Quoted in *The Complete Annotated Guide to Federal Access to Information*, 161-162 and 179.

[7] Information and Privacy Commissioner/Ontario, *Annual Report 2004* (Toronto: Office of the Information and Privacy Commissioner of Ontario, 2005), 5.

[8] Alasdair Roberts, "Administrative Discretion and the Access to Information Act: An 'Internal Law' on Open Government?" *Canadian Public Administration* 45, no. 2 (2002): 175-194.

[9] Testimony of Isabelle Roy: Gomery Commission, *Transcript of Public Hearing, October 14, 2004* (Ottawa: Commission of Inquiry to the Sponsorship Program and Advertising Activities, 2004), 3672; Testimony of Anita Lloyd: Gomery Commission, *Transcript of Public Hearing, November 23, 2004*, 6547.

[10] Testimony of Anita Lloyd: Gomery Commission, *Transcript of Public Hearing, November 23, 2004*, 6544.

[11] Ibid.

[12] Ibid., 6559.

[13] Ibid., 6549-6551.

[14] Ibid., 6550.

[15] Alasdair Roberts, "Spin Control and Freedom of Information," *Public Administration* 83, no. 1 (2005): 1-23; Ann Rees, "Red File Alert: Public Access at Risk," *Toronto Star*, November 1, 2003, A32.

[16] Roberts, "Spin Control and Freedom of Information," 10.

[17] An analysis of data on use of the search features of CAIRS extracted from its access log is provided in ibid., Table 1. In February 2004, Treasury Board Secretariat undertook its own survey of departments to ask about their use of CAIRS; survey responses released by TBS also suggested that few institutions were active users of the search features of the database. PCO did not respond to the survey: Alasdair Roberts, *Research Note: Results of TBS Survey on CAIRS* (Syracuse, NY: The Maxwell School of Syracuse University, 2004).

[18] Jonathan Murphy, "Your Candle's Flickering, Jean," *Globe and Mail*, May 17, 2002, A15.

[19] Rees, "Red File Alert: Public Access at Risk."

[20] Information Commissioner of Canada, *Annual Report 1999-2000* (Ottawa: Office of the Information Commissioner, 2000), 15-18.

[21] Roberts, "Spin Control and Freedom of Information," 8-9.

[72] Roberts, "Administrative Discretion and the Access to Information Act: An 'Internal Law' on Open Government?" The Information Commissioner suggested in 2000 that one cause of such delays was the Government's impulse during the "grants and contributions scandal" to "let its reflexive need to 'control' the story take precedence over the legal rights of access requesters to obtain timely responses. Ministers wanted to be out front of any access request — making a clean breast of any bad news before it hit the street and, when it did, being armed with an action plan:" Information Commissioner of Canada, *Annual Report 1999-2000*, 15-18.

[73] Roberts, "Spin Control and Freedom of Information," Tables 3 and 4.

[74] Colin McNairn and C.D. Woodbury, *Government Information: Access and Privacy*, Release 1, 2000 ed. (Toronto: Carswell, 2004), section 2(1)(a).

[75] Access to Information Review Task Force, *Access to Information: Making it Work for Canadians* (Ottawa: Treasury Board Secretariat, 2002), 124.

[76] Treasury Board Secretariat, *Review of the Costs Associated with Administering Access to Information and Privacy (ATIP) Legislation* (Ottawa: Treasury Board Secretariat, 2000).

[77] Testimony of Isabelle Roy: Gomery Commission, *Transcript of Public Hearing, October 14, 2004*, 3660-3661.

[78] Information Commissioner of Canada, *Annual Report 1999-2000*, 49, 68.

[79] Access to Information Review Task Force, *Highlights of Meeting of Assistant Deputy Ministers Advisory Committee* (Ottawa: Treasury Board Secretariat, 2001).

[80] Information Commissioner of Canada, *Annual Report 2000-2001* (Ottawa: Office of the Information Commissioner, 2001), 64.

[81] Deborah Lovett, *Inquiries before the Information and Privacy Commissioner: Evidentiary Considerations* (Vancouver: Continuing Legal Education Society of British Columbia, March 19, 2001 [Accessed June 28, 2005]), available from http://www.cle.bc.ca/CLE/Analysis/Collection/01-5127701-freedominfo?practiceAreaMessage=true&practiceArea=Administrative%20Law.

[82] Gomery Commission, *Transcript of Public Hearing, November 23, 2004*, 6576-6598.

[83] Treasury Board Secretariat, *Review of Access to Information and Privacy Coordination in Government Institutions* (Ottawa: Treasury Board Secretariat, 1986).

[84] Bruce Mann, "The Federal Information Coordinator as Meat in the Sandwich," *Canadian Public Administration* 29, no. 4 (1986): 579-582.

[85] Access to Information Review Task Force, *Access to Information: Making it Work for Canadians*, 126.

[86] Access to Information Act Review Task Force, *Consultation: Access to Information Coordinators* (Ottawa: Access to Information Act Review Task Force, 2000).

[87] Standing Committee on Public Accounts, *Evidence* (Ottawa: House of Commons, 2004). Emphasis added.

[88] Gomery Commission, *Transcript of Public Hearing, October 14, 2004*, 3667.

[89] Hon. John Reid, *Remarks to the House Committee on Access to Information, Privacy and Ethics* (Ottawa: Office of the Information Commissioner, 2005).

[90] Anecdotal evidence strongly supports the view that the ATIA has discouraged proper record-keeping. On the other hand, an early study of the impact of the Australian FOIA, based on interviews with government officials, reported that there had been no significant impact on the frankness of official advice: Robert Hazell, "Freedom of Information in Australia, Canada and New Zealand," *Public Administration* 67, no. 2 (1989): 189, 204. A 2001 study by Canada's National Archives reached a similar conclusion. The archivists' expectation was that the ATIA would be found to have had "a significant and negative influence on record-keeping" within the federal bureaucracy. However, the researchers were surprised to conclude from their research that there was "no evidence . . . that the Access to Information Act has altered approaches to record-keeping in the Government of Canada:"

National Archives of Canada, *The Access to Information Act and Record-Keeping in the Federal Government* (Ottawa: National Archives of Canada, 2001).

The Canadian Information Commissioner's complaint about an "oral culture" has been mirrored by concerns about the emergence of a "sofa culture" within the Blair Government, documented by the Butler Review of Intelligence on Weapons of Mass Destruction in 2004 — a culture in which "formal procedures such as meetings were abandoned [and] minutes of key decisions were never taken." This "sofa culture" had apparently taken root well before the implementation of the United Kingdom's FOIA. See Peter Oborne, "The Sofa Revolution," *The Tablet*, July 17, 2004, http://www.thetablet.co.uk/cgi-bin/book_review.cgi/past-00192.

For example, technologies such as email capture interactions which had never been recoverable previously. Conversations which once might have been undertaken in person or by telephone are now "a matter of record." On the other hand, journalists have complained that officials now routinely "RAD" — that is, "read and delete" — potentially sensitive emails: Judith Lavoie, "Civil Servants Fearful of FOI Don't Keep Written Record," *Vancouver Sun*, September 26, 2003, B3; Greg Weston, "Read and Delete: Read It and Weep," *Toronto Sun*, June 8, 2003, C4.

Information Commissioner of Canada, *Annual Report 2000-2001*, 66.

As an internal TBS assessment of the Commissioner's proposal has recently observed: "[I]t is quite straightforward to require in policy that government contracts for goods and services be documented. It is more problematic to prescribe in policy what should be documented as a result of a more casual discussion amongst officials such as a commitment to contact a specialist for advice as part of an issues management responsibility:" Treasury Board Secretariat, *The Duty to Document: Assessment of Information Commissioner's Proposal*, released under ATIA A-2004-00137/rr (Ottawa: Treasury Board Secretariat, 2004).

Information Commissioner of Canada, *Annual Report 1996-1997* (Ottawa: Office of the Information Commissioner, 1997).

Somalia Commission of Inquiry, *Report* (Ottawa: Public Works and Government Services Canada, 1997).

Section 67.1.

Andrew Osler, "Journalism and the FOI Laws: A Faded Promise," *Government Information in Canada* 17 (1999), http://www.usask.ca/library/gic/17/osler.html.

Roberts, "Green Paper on Legislation on Public Access to Government Documents," 7. Emphasis added.

The comment is made in an email released in response to CIC ATIA request 2002-05225, page 539.

Statistics provided by institutions in reports required by section 72 of the ATIA, and consolidated by Treasury Board Secretariat. The number of media requests rose between those two periods at a greater rate than did queries from other types of requesters.

I develop this argument in more detail in Alasdair Roberts, *Blacked Out: Government Secrecy in the Information Age* (New York: Cambridge University Press, 2005), chapters 3 and 4.

Donald Savoie, *Breaking the Bargain* (Toronto: University of Toronto Press, 2003), 164.

OECD, *Ministerial Symposium on the Future of Public Services* (Paris: OECD, 1996), Session 2.

Rowan Williams, *The Media: Public Interest and Common Good* (London: Lambeth Palace, June 15, 2005 [Accessed June 17, 2005]), available from http://www.archbishopofcanterbury.org/sermons_speeches/050615.htm.

Standing Committee on Public Accounts, *Evidence*.

Canada (Information Commissioner) v. Canada (Prime Minister), [1993] 1 F.C. 427.

Access to Information Review Task Force, *Highlights of Meeting of Assistant Deputy Ministers Advisory Committee*.

[59] Ontario *Freedom of Information and Protection of Privacy Act*, section 10(1)(b). The institution must provide reasons for disregarding a request on these grounds (section 27.1(1)). Criteria for determining whether a request is "frivolous or vexatious" are elaborated in R.R.O. 1990, Regulation 460, section 5.1. Such a request must be part of a "pattern of conduct that amounts to an abuse of the right of access or would interfere with the operations of the institution," or be "made in bad faith or for a purpose other than to obtain access." The decision to refuse a request may be appealed to the Information Commissioner.

[60] Treasury Board Secretariat, *Review of the Costs Associated with Administering Access to Information and Privacy (ATIP) Legislation.*

[61] Access to Information Act Review Task Force, *Highlights of Assistant Deputy Ministers Advisory Committee Meeting.* See also the argument for fee reform in the TBS cost study: Treasury Board Secretariat, *Review of the Costs Associated with Administering Access to Information and Privacy (ATIP) Legislation.*

[62] Hon. Michael Kirby, *Lecture to the British Section of the International Commission of Jurists: Freedom of Information, the Seven Deadly Sins* (Canberra: High Court of Australia, 1997). Emphasis in original.

[63] Kevin Murphy, *Address on the Launch of the Freedom of Information Act, 1997* (Dublin: Office of the Ombudsman, 1998).

[64] United Kingdom, *Your Right to Know: The Government's Proposals for a Freedom of Information Act*, Cm 3818 (London: Stationery Office, 1997), Preface; Lord Falconer, *Address to the Society of Editors' Annual Conference* (London: Department of Constitutional Affairs, 2004).

[65] John Podesta, "Need to Know: Governing in Secret," in *The War on Our Freedoms*, ed. Richard C. Leone and Greg Anrig, Jr. (New York: Public Affairs, 2003).

[66] Information Commissioner of Canada, *Annual Report 2004-2005* (Ottawa: Office of the Information Commissioner, 2005), 4.

[67] Access to Information Review Task Force, *Access to Information: Making it Work for Canadians*, 157-158.

[68] Ibid., 157-165.

[69] Information Commissioner of Canada, *Annual Report 2000-2001*, 64.

[70] Standing Committee on Justice and Solicitor General, *Open and Shut: Enhancing the Right to Know and the Right to Privacy* (Ottawa: Queen's Printer, 1987).

[71] Information Commissioner of Canada, *Annual Report 2000-2001*, 64.

[72] *Freedom of Information and Protection of Privacy Act*, S.B.C. 1992, section 6(1).

[73] *Freedom of Information and Protection of Privacy Act*, S.A. 1994, c. F-18.5, section 9(1).

[74] *Freedom of Information Act*, 2000, section 16(1).

[75] See also Alasdair Roberts, "New Strategies for Enforcement of the Access to Information Act," *Queen's Law Journal* 27 (2002), 647-683, Table 4.

[76] For evidence of the fallout from this effort, see Access to Information Review Task Force, *Access to Information: Making it Work for Canadians*, 104-110.

[77] Reid, *Remarks to the House Committee on Access to Information, Privacy and Ethics.*

[78] See the *Parliament of Canada Act*, section 72.04.

[79] Standing Committee on Access to Information, *A New Process for Funding Officers of Parliament* (Ottawa: House of Commons, 2005).

[80] *Access to Information Act*, section 54(1).

[81] David Pugliese, "Grace Opens Fire: Departing Information Czar Says Government's Choice for Replacement Shows 'Contempt for the Public,'" *Ottawa Citizen*, May 7, 1998, A1.

[52] In a recent discussion paper, the Department of Justice suggests that institutions be permitted to recover the full cost of processing requests after the cost exceeds $10,000: Justice Canada, *A Comprehensive Framework for Access to Information Reform* (Ottawa: Justice Canada, 2005), 26. A modification of this proposal might require the requester to make a case for the importance of a request when costs exceed a certain amount. South African law, for example, qualifies the right to information in certain circumstances by stating that the right exists if information "is required for the exercise or protection of any rights:" *Promotion of Access to Information Act, 2000*, section 9(a)(ii).

[53] Treasury Board Secretariat, *Meeting the Expectations of Canadians: Review of the Governance Framework for Canada's Crown Corporations* (Ottawa: Treasury Board Secretariat, 2005).

[54] Standing Committee on Justice and Solicitor General, *Open and Shut: Enhancing the Right to Know and the Right to Privacy*, 2.6.

[55] Canada Post Mandate Review, *The Future of Canada Post Corporation* (Ottawa: Canada Post Mandate Review, 1996), section 7.18.

[56] Access to Information Review Task Force, *Access to Information: Making it Work for Canadians*, 24-25.

[57] These are Canada Development Investment Corporation, Canadian Race Relations Foundation, Cape Breton Development Corporation, Cape Breton Growth Fund Corporation, Enterprise Cape Breton Corporation, Marine Atlantic Inc., Old Port of Montreal Corporation Inc., Parc Downsview Park Inc., Queens Quay West Land Corporation and Ridley Terminal Inc.: Treasury Board Secretariat, *Meeting the Expectations of Canadians: Review of the Governance Framework for Canada's Crown Corporations*, 37.

[58] These are VIA Rail Canada Inc., National Arts Centre Corporation, Canadian Broadcasting Corporation, Export Development Canada, Canada Post Corporation, Atomic Energy of Canada Limited and the Public Sector Pension Investment Board: Ibid.

[59] Justice Canada, *A Comprehensive Framework for Access to Information Reform*, 7.

[60] Ibid., 6.

[61] Authorized by the *Airport Transfer (Miscellaneous Matters) Act, 1992*.

[62] Established by the *Nuclear Fuel Waste Act, 2002*.

[63] Canadian Blood Services was created with agreement of federal and provincial governments in 1998 as the successor to the Canadian Red Cross Blood Program and the Canadian Blood Agency, the former funding and policy arm of Canada's blood supply system. The Canadian Blood Agency was a federal not-for-profit corporation established in 1991 to assume the functions of the Canadian Blood Committee: Krever Commission, *Final Report* (Ottawa: Commission of Inquiry on the Blood System in Canada, 1997), 1004. The federal government initially intended to adopt a *Canadian Blood Services Act* that would "enshrine the mandate and governance structure of the new national blood authority, the Canadian Blood Services:" Health Canada, *1998-1999 Estimates* (Ottawa: Health Canada, 1998), 11. The Canadian Blood Committee had been at the centre of a controversy over the destruction of documents sought under the ATIA: Information Commissioner of Canada, *Annual Report 1996-1997*, 66.

[64] Access to Information Review Task Force, *Access to Information: Making it Work for Canadians*, 22-23.

[65] Ibid., 22.

[66] Alasdair Roberts, "Structural Pluralism and the Right to Information," *University of Toronto Law Journal* 51, no. 3 (2001): 243-271; Jerry Bartram, *The Scope of the Access to Information Act: Developing Consistent Criteria for Decisions Respecting Institutions* (Ottawa: Access to Information Review Task Force, 2001).

[67] *Freedom of Information Act, 2000*, section 5.

[68] Access to Information Review Task Force, *Access to Information: Making it Work for Canadians*, 24.

[69] Information Commissioner of Canada, *Annual Report 2000-2001*, 57.

[illegible] Justice Canada, *A Comprehensive Framework for Access to Information Reform*, 8.

[illegible] See Part II of the Main Estimates 2004-2005, p. 1-28.

[illegible] In fiscal year 2004 the federal government received 2,835 requests from the media. I assume, based on the statistics I noted earlier, that the federal government receives between 1,000 and 2,000 "partisan" requests a year.

[illegible] The analysis is compromised by problems of underreporting within CAIRS. For the full analysis, see Alasdair Roberts, Jonathan DeWolfe and Christopher Stack, *An Evidence-Based Approach to Access Reform*, Policy Studies Working Paper 22 (Kingston: School of Policy Studies, 2001).

[illegible] Data taken from Table 5 of the Government's Population Affiliation Report: http://www.hrma-agrh.gc.ca/hr-rh/hrtr-or/hr_tools/Intro_e.asp.

THE *LOBBYISTS REGISTRATION ACT*: ITS APPLICATION AND EFFECTIVENESS

A. Paul Pross

The *Lobbyists Registration Act* (LRA) was proposed by the Mulroney Government in September 1985, presented to Parliament in June 1987, received Royal Assent in September 1988, and came into force on September 30, 1989.[1] It was amended in 1995, 1996, 2003 and 2004.[2]

Although the first version of the Act was enacted as a Government Bill, the goal of bringing some form of regulation to the burgeoning lobbying industry had been a long-standing project of a group of backbench MPs.[3] These took an active part in the formulation of the first version of the Act, and their successors have continued in their footsteps as the Act has gone through three periodic revisions. Perhaps because of this sustained backbench interest, the regulatory regime established by the Act has passed through a classic progression of incremental changes reflecting experience with its provisions and with the need to support its stated goals with real legislative muscle. Refinements are still needed, but, as the following discussion will attempt to show, it is on improvements in the administration of the Act that its ultimate effectiveness depends.

This paper looks first at the legislative history of the *Lobbyists Registration Act*, then examines its strengths and weaknesses, and finally considers legislative and administrative improvements.

1 The Legislative History of the *Lobbyists Registration Act*

When he tabled the original version of Bill C-82, the *Lobbyists Registration Act*, the Minister of Consumer and Corporate Affairs, Harvie André, stated that it addressed the public's need to know who is talking to government, but avoided the pitfalls of attempting to regulate lobbyists.[4] Accordingly, the preamble to the subsequent Act affirmed the importance of "free and open access to government" and the legitimacy of lobbying public office holders, but declared that public office holders and the public should be able to know who is engaged in lobbying activities. Employing the terms "openness" and "transparency" that had been a *leitmotif* of the two-year debate that had preceded introduction of the Bill, the Government proposed that "registration, but not regulation" should be the key feature of the legislation, seeking in simplicity a system that neither discouraged the general public from petitioning government nor created a process liable to become constipated by its own insatiable appetite for information.[5]

The principal features of the 1989 Act were its definition of a lobbyist, the requirement to register, the establishment of a registry, and the distinction it drew between consultant lobbyists and those working for corporations and non-profit organizations.

A lobbyist was defined as anyone who receives payment to represent a third party in arranging meetings with public office holders[6] or in communications with them concerning the formulation and modification of legislation and regulations, policy development, the awarding of grants or contributions, and the awarding of contracts (section 5). This was a major step in the direction of simplification, since it relieved both volunteers and businessmen representing their own interests from the obligation to register. Simplification was carried further by the decision to divide lobbyists into two categories (or tiers) and to limit the information required of some lobbyists. Tier I lobbyists were described as "professional lobbyists" who represented clients before government (section 5.1). Tier II lobbyists on the other hand were employees either of interest groups or corporations who spent a "significant part" of their employment representing their employer to government (section 6). Within ten days of undertaking to represent an interest on any one of a series of widely-defined activities, Tier I lobbyists would have to register with the Deputy Registrar General their own names, those of their client, and the subject matter of proposed meetings or communications with officials (section 5.2). Tier II lobbyists would provide, annually, even less information: simply their names and the name and address of the corporation or organization employing them (section 6). They would not be required to report the subject matter of their communications with officials. Neither was required to submit financial information.

Certain persons, activities and types of information were specifically excluded. Officials of other governments, Canadian and foreign, were not required to register if they were communicating with federal office holders in the course of their official duties (section 4.1). Presentations that are a matter of public record did not have to be reported, nor did representations made to office holders considering the interpretation or application of laws or regulations in relation to specific individuals or organizations (section 4.2). Information that might affect the safety of individuals was also exempted (section 4.3).

The Bill was much weaker than many had expected.[7] Mapping services[8]—which were provided by some of the most influential firms—were not covered, nor was registration extended to firms engaged in indirect lobbying. Those lobbyists required to register were asked to provide much less information than had been proposed by Parliamentary supporters of registration. The representatives of corporations and formal interest groups were not required to report their lobbying activities; interest groups were not required to file even minimal information concerning their objectives and supporters. Although Tier I lobbyists were required to register the undertakings they had entered into, it would be quite easy to avoid spelling out the real subject matter of meetings. The sanctions for failure to comply with the Act were less than compelling, incurring a fine of no more than $25,000; but conviction of filing of false or misleading information could incur fines of up to $100,000 and/or imprisonment for as much as two years (section 13). The proposed administrative arrangements were also flawed. The powers of the Registrar were insufficient. He or she would not be empowered to verify the information provided by lobbyists or to investigate it. Furthermore, as an employee of a government agency, the Registrar would be subject to government influence.

On September 9, 1985, when Prime Minister Mulroney had announced his intention to introduce legislation to "monitor lobbying activity and to control the lobbying process by providing a reliable and accurate source of information on the activities of lobbyists," he promised to ensure that "persons who are approached by lobbyists for Canadian corporations, associations and unions, and by agents on behalf of foreign governments and other foreign interests, (would) be clearly aware of who is behind the representations." Critics of the 1989 Act felt that the Government had put forward a Bill that required lobbyists to do little more than register their names and addresses. They dubbed the LRA the "business card Bill."

The Act, however, did include one clause that was little noticed but that has had a significant influence on the evolution of lobbyist regulation. Section 14 provided that three years after the Act came into force, a

Parliamentary committee would review its "administration and operations" and recommend appropriate changes. This relatively unusual provision has ensured periodic examination of the Act so that many, but not all, of its initial weaknesses have been rectified.

The first of these reviews was ordered by the House of Commons in November 1992, and was conducted by the Standing Committee on Consumer and Corporate Affairs and Government Operations, chaired by Felix Holtmann, MP for Portage-Interlake. It held hearings in early 1993, and in June delivered a report that recommended a number of changes, some of them substantive. Although, in the melee of the 1993 election and the subsequent change of government, these might have been pushed to one side, ultimately they did bear fruit. During the election, all political parties committed to following up the report, and on June 15, 1994, the House of Commons Standing Committee on Industry appointed a subcommittee, chaired by Paul Zed, to study and report on amendments to the LRA, if and when they should be proposed to the House by the new Government. Subsequently, an amending Bill (Bill C-43) was presented, and in the fall of 1994, the Committee held hearings to consider it.[9] Since both Bill C-43 and the Zed Committee built on and elaborated the work of the Holtmann Committee, the following comments will summarize their findings jointly.

Both Committees considered that the LRA had had a positive effect. In the view of the Holtmann Committee, it had:

> ...added a measure of transparency to the activities of lobbyists. The public now has an opportunity to know who, for pay, is attempting to influence certain government decisions. The act of lobbying has been legitimized and for the most part, institutionalized as part of the way in which our country is governed.[10]

Nevertheless, while being, according to the Zed Committee, "a step in the right direction," weaknesses were identified. The Holtmann

Committee recognized that "not all lobbyists or all lobbying activities are covered by the Act,"[11] while the Zed report agreed with witnesses that its provisions were "insufficient."[12]

Criticism, and the subsequent recommendations in both reports, focused primarily on the disclosure issue, but they also addressed questions related to the inclusiveness of the registration net, the investigatory powers of the Registrar, the Branch's administrative independence, and the need to encourage professional standards amongst lobbyists.

On the disclosure issue, the Holtmann Committee suggested that the two-track registration system did not disclose sufficient information about the lobbying objectives of corporate and organization lobbyists, and recommended eliminating it. It proposed a uniform disclosure procedure for all registrants. In the same vein, the Committee criticized the reporting form adopted by the Lobbyist Registration Branch (LRB), calling for one that elicited more detail on the subject matter of lobbying and in the identification of the agencies to be approached. The Zed Committee was more sympathetic to the considerations that had inspired the two-tier approach, arguing that there were valid reasons for differentiating corporate and organizational lobbyists from their colleagues in the consulting business. It agreed that substantially the same information should be required of all lobbyists,[13] but suggested that organization and corporate lobbyists should observe different filing deadlines. Instead of filing within 10 days of undertaking a program of representation, association and corporate lobbyists would be expected to file on a semi-annual basis. Organization lobbyists would have to file only one registration for their organization, not — as in the case of consultant and corporate lobbyists — separate registration for each employee engaged to a significant degree in lobbying.[14]

A theme in both disclosure discussions was the need to "keep it simple." The Holtmann Committee emphasized the pains that had been taken to respect the principles of simplicity and ease of access.

> It is an important goal of the Act to ensure that unnecessary barriers are not put in the way of those wishing to present their case to government. The Committee acknowledges that the Act has neither created such barriers nor impeded open access to government.[15]

Zed and his colleagues agreed, and incorporated in their report a test against which they measured every demand for increased disclosure, namely:

> [I]s the information being requested from lobbyists genuinely needed to satisfy Canadians that lobbyists' activity is compatible with the public interest, and to help parliamentarians counterbalance the efforts of individual lobbyists with efforts on behalf of ordinary Canadians?[16]

Thus they agreed with the Holtmann Committee on expanding disclosure to include identification of the organization members of coalitions and to identify the techniques used in lobbying, particularly grass-roots campaigns, but there were differences in approach. The Holtmann Committee felt that only those coalition members contributing significantly to a joint lobby should be registered, whereas the Zed Committee was more inclusive.[17] On the other hand, the Holtmann Committee proposed registering only those "professional lobbying efforts aimed at the 'grass-roots' which exceed a threshold amount" in order to avoid "needlessly complicating efforts by small groups to convey their concerns to government,"[18] whilst the Zed Committee argued that lobbyists should be required to report the communications techniques — including grass-roots lobbying — that they would be using to influence government decisions, a less onerous and less revealing requirement.[19] Similarly, Zed and his colleagues picked up on Holtmann's reference to the fact that "unpaid lobbyists do not have to register,"[20] but concluded that "on balance, we do not think that registration by volunteers is genuinely needed at this time, given the ultimate purpose of disclosure."[21] On the more controversial issue of whether or not mapping services should be registered, they reached the same conclusion on the following grounds:

> [A] number of consultant lobbyists...stressed the importance of aspects of their work that do not involve direct lobbying of public officials, and that rather function to help clients develop policy positions and communicate effectively with government. The importance to clients of this aspect of lobbying does not, however, necessarily create an issue of public trust. In our view, the fact that the clients of lobbyists may receive expert advice does not, in itself, cast doubt on the fairness of public decisions; a good portion of the content of this expert advice is available to any citizen who takes the time to become informed about government and the policy process. When the clients of a lobbyist put this knowledge to work by communicating with government, or engaging a consultant to do so on their behalf, they become subject to existing registration requirements. We think this achieves what is needed.[32]

Finally, the Zed Committee argued that consultations initiated by government officials should be added to the list of exempt communications found in section 4(2) of the LRA, on the grounds that it would reduce paper burden for lobbyists, eliminate the collection of unnecessary information on the part of the Registrar, and "would ensure that government and outside groups work in partnership as much as possible, to meet the policy challenges of the nineties."[33]

On balance, though both Committees emphasized the need to streamline the collection of information while bolstering the public's ability to learn what lobbying activity is in progress, the Holtmann Committee was more inclined to expand the information gathering role of the Registrar than was the Zed Committee, which argued that there was a danger:

> ...created...by a tendency apparent in many of the submissions we received to take the "transparency" of the lobbying process as the ultimate objective of this legislation. Once "transparency" is adopted as an objective, attention naturally focuses on things we do not yet

> know about lobbying and by an entirely logical progression, expectations about what should be disclosed take flight.[74]

Transparency was needed to restore public trust in government. It was not "an ultimate objective."

These were relatively minor proposals for revision of the first version of the LRA. Far more significant were the changes both Committees, and the Government, proposed concerning the subject matter of lobbying and the identification of the agencies being lobbied. The 1989 Act required only that consultant lobbyists report "the proposed subject matter of the meeting or communication" (section 5(2)(d)). It was evident from the testimony at the Holtmann Inquiry that registrants were not being required to provide meaningful information about the exact nature of the Government decisions that they were attempting to influence.[75] Bill C-43 proposed to remedy this by requiring consultant lobbyists to disclose "particulars to identify the subject-matter in respect of which the individual has undertaken to communicate with a public office holder, or to arrange a meeting, and such other information respecting the subject matter as is prescribed."

In endorsing the Government's proposed clarification of the subject matter of disclosure, the Zed Committee noted that corporation and organization lobbyists would not be required to disclose lobbying directed at obtaining government contracts for their firms or organizations. We will return to this point later.

The absence of any requirement to report the names of departments or government agencies that were being lobbied was recognized as a major weakness in the first version of the LRA. As the Zed Committee put it, "virtually nothing is known about the third party in the lobbying relationship: government."[76] There was, accordingly, unanimous endorsement of the provision in Bill C-43 that would "require lobbyists to name the department or government institution with whom they had communicated or with whom they intend to communicate in an effort to influence policy."[77] There was not, however, a unanimous view on whether or not the names of office holders should be disclosed, or whether the office holders themselves ought to be expected to record details of their meetings with lobbyists. The majority members of the Zed Committee, encouraged by the advice of the long-serving, erudite and deeply experienced Mitchell Sharp, held that requiring civil servants to file information with this degree of detail would clog the registry and thus create a barrier to the public's ability to know what was going on in the decision-making process. In any case, the majority of the Committee argued, office holders would be expected to adhere to the strictures of the *Conflict of Interest and Post-Employment Code for Public Office Holders*, particularly section 23(2) of the Code, which expected that:

> In the formulation of government policy or the making of decisions, a public office holder shall ensure that no persons or groups are given preferential treatment based on the individuals hired to represent them.

Accordingly, the Zed Committee declined to recommend that disclosure requirements go beyond simply naming the agencies of government that lobbyists were approaching or intended to approach. Opposition members of the Committee filed minority reports objecting to this position and insisted that the main report contain a recommendation that the next review of the Act take another look at this issue.[78]

Amongst other issues, neither the Committee nor the Government Bill successfully addressed suggestions that the costs of lobbying be reported, and consequently made no attempt to impose such a requirement.[79] This issue will be discussed further, below. Calls for the banning of contingency fees were also unsuccessful, but the Zed Committee did recommend that Bill C-43 be amended to require lobbyists to disclose contingency-fee accounts.[10] Concern about government funding of some lobbying organizations was treated with greater sympathy, and the Zed Committee recommended requiring organizations lobbying the Government to report such funding.[11]

Lobbyists' political connections and previous government employment were also commented on by a number of witnesses. As the Zed Committee put it, "for some, the suspicion that lobbyists use personal connections with office holders to obtain special favours from government lies at the heart of what disturbs them most about lobbying."[12] Yet the Committee could not accept the view that these connections should disqualify individuals from engaging in paid lobbying. In its eyes, disqualification would conflict with the right of all Canadians to participate in political life. As for the possibility that lobbyists might trade on their previous government employment, the Committee felt that "past service with the Government does not constitute a secret that needs "disclosure." On the contrary, government experience on the part of lobbyists facilitates the conduct of public business. In any case, the Committee argued, "post-employment codes and other measures already in place are sufficient guarantees against potential wrong-doing."[13]

In the cost-conscious environment of the first Chrétien mandate, it was understandable that the Zed Committee would emphasize the view that the Registry should be "commended for accomplishing much with relatively little," and that "proposed changes not inflate the size or budget of this office." Perhaps, however, it was stretching credulity to observe as well that "we heard no evidence to suggest that the Registry is not accomplishing its aims."[14] After all, only a few months earlier, the previous Government had been summarily dismissed by the voters very largely because investigative journalists had convincingly reported a number of highly questionable decisions that were linked to lobbying and influence peddling.[15] The fact of the matter was that the Registry's aims were very modest, its powers limited and its resources sufficed only to pass on to the Canadian public such information as lobbyists chose to file. Furthermore, the Holtmann and Zed Committees heard primarily from participants in the policy community that had sprung up around the LRA and its enforcement. The lobbyist members of this community had no incentive to wash dirty linen in public, whilst academics and the few disinterested interest groups lacked the resources to investigate lobbying improprieties and hesitated to level charges that they could not substantiate. Opposition members of Parliament were less inhibited, however, and the Committees did acknowledge suggestions that "more individuals are lobbying than are registered," and admitted that enforcement might therefore be "less than satisfactory."[16] It followed that the powers of the Registrar had to be examined.

Bill C-43, reflecting the testimony before the Holtmann Committee, introduced a slight expansion of the Registrar's duties, authorizing the office to seek clarification of information filed with it. Informally, the Registration Branch had been interpreting the Act for the benefit of registrants, and the Zed Committee proposed institutionalizing this activity by giving it explicit authority to issue interpretation bulletins.[17] More significantly, the Committee recommended giving the Registrar the authority to "conduct random audits of the information on file."[18] It added that "evidence of non-compliance should be reported to the RCMP immediately." To enhance the prospects for successful prosecutions, the Zed Committee recommended that the limitation period for laying charges in connection with summary conviction for contravening the Act be extended from six months to two years, and that the next review of the Act specifically enquire into the adequacy of this extension.[19] Finally, recognizing implicitly that these changes would secure only a moderate increase in compliance, the two committees emphasized the need for voluntary regulation, calling upon citizens to report suspected cases of non-compliance and harkening back to a recommendation made by the first parliamentary committee to look at the lobbying issue by proposing that, "because lobbyists themselves have an interest in reinforcing the legitimacy of their activities," they should be encouraged to organize themselves into a professional organization and adopt a code of ethics.[40]

The Zed Committee's decision not to accept the advice of some witnesses that the requirements of the LRA should be tightened and the position of the Registrar strengthened, was neither as disingenuous nor as complacent as it might initially appear. The newly-elected Government of Jean Chrétien had made ethics issues an important part of the 1993 campaign, and brought to office a clearly defined approach to preventing a recurrence of the problems that had troubled the Mulroney Government. In this approach, the LRA was seen as only one of several pieces of legislation and policies that, together, would set out standards of behaviour, establish advisory, monitoring and reporting structures, and where necessary, carry out investigations and prosecute infractions. Prior to 1994, the chief of these related measures was the *Criminal Code*, which, with its sanctions against influence peddling, bribery and corruption, warranted investigation by the RCMP, and the *Conflict of Interest and Post-Employment Code of Conduct for Public Office Holders*.

The new Government proposed that these loosely coordinated measures be tied together more securely through the appointment of an Ethics Counsellor who would have responsibility for developing a code of conduct for lobbyists and for monitoring both that and the *Conflict of Interest Code*. To that end, amendments to the LRA were introduced through Bill C-43, and revisions were incorporated in the *Conflict of Interest Code*. Accordingly, the LRA provided that the Ethics Counsellor would consult with the policy community to develop a lobbyists' code of conduct and would monitor adherence to the Code, reporting to Parliament.[41] In the latter capacity, the Ethics Counsellor would have the investigatory powers that had not been accorded the Registrar of

Lobbyists, particularly the power to "summon and enforce the attendance of persons, and to compel the giving of evidence and the production of documents and payment of records."[42] The Zed Committee noted witnesses' concerns that these powers were insufficient, given the fact that the code of ethics did not have the status of law, but argued that:

> [T]he consistent focus of the LRA…is on the disclosure of information about lobbying to Canadians. The Ethics Counsellor envisioned in Bill C-43 would reflect this focus, by advising Parliament of infractions of the Code of Conduct rather than undertaking the direct regulation of lobbyists. This underlying approach recognizes that an informed public, represented by an informed Parliament, provides stronger guarantees of the ultimate integrity of the political process than could be achieved by additional regulation, given that influence peddling and other criminal offences are already included with the *Criminal Code*.[43]

The Zed Committee thus adhered to the distinction, articulated by both the Mulroney and Chrétien administrations, that lobbying should be monitored, but not regulated, and that public disclosure, not prosecution, would best preserve the integrity of the policy-making process. The Committee, as we have noted, was also highly conscious of the need to minimize the costs of administering the program, arguing that:

> Providing the Ethics Counsellor with significantly increased powers to enforce the Code of Conduct would create a need for expanded procedural protections, and result in the establishment of an enforcement bureaucracy. It would thus inevitably involve increased costs.[44]

The Committee did, however, recommend amendments to Bill C-43 that made investigation of breaches of the Code mandatory and required that reports to Parliament include the Counsellor's "full investigatory findings, conclusions reached and reasons therefore."[45] It also noted that while it had rejected suggestions that the LRA require disclosure of the costs of lobbying, there were circumstances when "the magnitude of spending becomes an issue of special public concern when spending on behalf of one side of a public controversy so greatly exceeds spending on the other side as to threaten to distort public debate and decision-making."[46] These circumstances, in the view of the Committee, warranted an amendment to Bill C-43 authorizing the Ethics Counsellor to "obtain as evidence and include in the report of an investigation any payment received, disbursement made or expense incurred by a lobbyist where this is seen to be in the public interest."[47]

Considerable debate surrounded the reporting relationships of the Ethics Counsellor. Under Bill C-43, the Ethics Counsellor would be an Order in Council appointment, reporting to the Registrar General in relation to his or her responsibilities under the LRA, but reporting to the Prime Minister, through the Clerk of the Privy Council, in relation to the *Conflict of Interest Code*. Critics took two positions. Some expressed concern that the role of guarding the public's right to be informed about lobbying activity was incompatible with the role of advising the Prime Minister concerning the ethical conduct of ministers and officials. Others went further and argued that the Ethics Counsellor could not be an effective watchdog for the public whilst simultaneously serving the Government of the day. They believed that the Ethics Counsellor and the Registrar should be officers of Parliament, with the Prime Minister appointing an officer in the Prime Minister's Office or the Privy Council Office to advise internally on ethics issues. The Zed Committee accepted neither of these positions, stating that:

> [W]e do not think the duties of the Ethics Counsellor involve requirements for impartiality and good judgment radically different from those applying to a host of duties presently conducted to the apparent satisfaction of the public, by members of the public service.[48]

As for the Lobbyists' Code of Conduct, the Government proposed and the Committee endorsed a persuasive rather than a prescriptive approach, arguing that strict regulation does not necessarily ensure compliance, but does guarantee considerable expenditure. The Committee found the testimony of a number of witnesses "persuasive on this issue," and added that:

> [T]he code envisioned in Bill C-43 is consistent with the approach to lobbying taken elsewhere in the Bill: it would result in the disclosure of questionable behaviour rather than direct sanctions, and leaves members of the public, their representatives, and prospective employers of lobbyists free to respond according to the particulars of the situation."[19]

The Committee did, however, amend the Bill to require lobbyists to comply with the Code and also required the Ethics Counsellor to seek Parliament's views as the Code was drafted.

The combined recommendations of the Holtmann and Zed Committees, together with proposals emanating from the public service, constituted a major revision of the LRA, essentially creating the administrative and regulatory regime that is in effect today. The Act, when it took full effect on January 31, 1996, did the following:

- Identified three classes of individuals—consultant, corporate and association lobbyists—who were required to register any paid undertaking that involved communicating with public officials with a view to influencing the development, or defeat, of legislative proposals, regulations, public policies and programs and the awarding of grants and contracts;

- Specified that registration should occur within defined time limits, and would include (a) the subject matter of their communications with public officials, (b) the names of the agencies lobbied, and (c) the communications techniques employed;

- Established certain exemptions, notably the official representations of employees of other governments; communications with officials concerning the routine application of regulations; and the presentations made by all interests before Commissions of Inquiry, Parliamentary committees and other hearings that are on the public record;

- Recognized that consultant, association and corporate lobbyists work in somewhat different circumstances and should therefore report their undertakings differently, though essentially the same information was required of each; and

- Created within the public service the positions of Ethics Counsellor and Registrar of Lobbyists whose responsibilities included the creation of a code of conduct for lobbyists; the monitoring of the code; the administration of the registry, including conducting audits of registrations; and, where necessary, investigating the information provided by lobbyists.

Further revisions came into force on June 20, 2005,[10] following the 2001 statutory parliamentary review of the Act, which was conducted by the House of Commons Standing Committee on Science, Industry and Technology.[11] These were not as substantial as those brought into effect in 1995, but several were important.

What probably caused the most upheaval in lobbying circles was a further refinement of the procedures applied to corporate and association lobbyists. In 1995, the responsibility for the registration of association lobbyists had been fixed with the most senior paid official of each organization. While every in-house lobbyist employed by the organization had to be identified,[12] it was this individual who signed off on the registration form. This procedure has now been extended to the registration of corporation lobbyists. The change is described as an attempt to "ease the administrative burden by eliminating the need for multiple filings,"[13] but its implications go beyond mere paperwork, as it is intended to "underline the reality that the ultimate responsibility for government relations usually rests at the highest corporate level."[illegible]

Other modifications can be expected to have a significant impact. The role of the Ethics Counsellor (now the Ethics Commissioner) is limited, and the Registrar is given greater authority over the *Lobbyists' Code of Conduct*.[illegible] Furthermore, he or she is required to report annually to Parliament and must send to Parliament the final report of any investigation carried out in relation to the Code. In a reversal of the position taken by the Government and the Zed Committee, it was now agreed that former public officials should disclose their previous employment and the positions they have held.[illegible] Semi-annual filings were now required of all lobbyists.[illegible] A loophole in the list of exemptions was closed by the revision of section 2(4)(c). The section had previously provided that the Act did not apply in respect of:

> any oral or written submission made to a public office holder by an individual on behalf of any person or organization in direct response to a written request from a public office holder, for advice or comment in respect of any matter referred to in any of (the clauses relating to the subject matter of lobbying undertakings).

The new wording, which reduces the opportunity for collusion between lobbyists and office holders, applies the exemption only "if the communication is restricted to a request for information."

Perhaps the most significant revision is a change in wording that removes the phrase "in an attempt to influence" and substitutes the phrase "in respect of."[illegible] We will look at the reasons for this change, and its effect, later. Other changes in wording effect a general tightening of the Act.[illegible]

1.1

Summary: The Legislative History of the LRA

The *Lobbyists Registration Act* came into force on September 30, 1989. Amendments in 1995, 1996, 2003 and 2004 introduced incremental changes that reflected experience with its provisions and with the need to support its stated goals with real legislative muscle. However, refinements are still needed.

The Act defined a lobbyist as anyone who receives payment to represent a third party in arranging meetings with public office holders or in communications with them concerning the formulation and modification of legislation and regulations; policy development; the awarding of grants or contributions; and the awarding of contracts (section 5). Its 1989 formulation recognized the legitimacy of lobbying, established a registry, and required consultant lobbyists to report the names of their clients, or employers, and the subject matter of their undertakings. Those working for corporations and non-profit organizations had to report their names and that of their employers. Penalties were set out for failing to register.

The aims of the Registry were modest, the powers of the Registrar limited, and the resources of the Lobbyists Registration Branch sufficed only to pass on to the Canadian public such information as lobbyists chose to file. All of this reflected the Mulroney Government's view that lobbying should be monitored, but not regulated, and that public disclosure, not prosecution, would best preserve the integrity of the policy-making process. As well, the costs of administering the program had to be minimal.

Since its inception, the Act has been reviewed three times, each review bringing new measures that addressed perceived problems with coverage, disclosure and the powers of the Registrar. In its current version, the Act creates the following regime:

- Three classes of individuals—consultant, corporate and association lobbyists—must register any paid undertaking that involves communicating with public officials with respect to the development, or defeat, of legislative proposals, regulations, public policies and programs, and the awarding of grants and contracts. Volunteer lobbyists are not required to register;

- Official representations by employees of other governments, communications with officials concerning the routine application of regulations, and the presentations made by all interests before Commissions of Inquiry, parliamentary committees and other hearings that are on the public record are exempted;

- Registration must occur within defined time limits, and in addition to identifying the lobbyist and lobbying firm, must disclose (a) the names of clients (or employers), (b) the subject matter of communications with public officials, (c) any official positions previously held by the lobbyist in the Government of Canada, (d) the names of the agencies lobbied, and (e) the communications techniques employed;

- Because consultant, association and corporate lobbyists work in somewhat different circumstances, they report their undertakings differently, though essentially the same information is required of each;

- A code of conduct is laid out and must be observed by lobbyists; and

- The Registrar of Lobbyists' responsibilities include monitoring of the code; the administration of the registry, including conducting audits of registrations; and, where necessary, investigating the information provided by lobbyists. The Registrar reports annually to Parliament and must also provide Parliament with the final report of any investigation carried out in relation to the Code.

From its inception, "registration, but not regulation" has been a key feature of the regime established by the *Lobbyists Registration Act*. Successive governments have attempted to create a system that neither discourages the general public from petitioning government, nor creates a regulatory process bedeviled by excessive information and unenforceable reporting requirements. As we shall see, this approach has achieved some worthwhile results. It also, however, ensured that, until recently, those responsible for administering the Act could not effectively fulfill its stated objective of ensuring that "public office holders and the public be able to know who is attempting to influence government."

2 Strengths and Weaknesses of the Current Act[40]

Since the following paragraphs will catalogue its significant flaws, it is essential to emphasize that the *Lobbyists Registration Act* (LRA) makes an important contribution to efforts to identify and regulate lobbying activity. It may not achieve the goal, sometimes attributed to it by enthusiastic politicians, of ensuring that Canadians know who is influencing public policy decisions, let alone what influence is being brought to bear, but it does articulate the public's right to that information and sets in place an agency that is authorized to discover it.

The Act's preamble is not empty verbiage. It sets out the conflicting principles that determine the scope of the Act and the powers of the Registrar. In asserting that "free and open access to government is a matter of public interest," the Act acknowledges the constitutional right of Canadian citizens to approach government. With the injunction that "it is desirable that public office holders and the public be able to know who is attempting to influence government," it establishes that the act of communication should be open to public inspection. In other words, the right of access is affirmed, but the obligation on the part of government to ensure transparency is also asserted, as is the need to ensure that transparency is achieved with a minimum of interference with access. At the same time as the constitutional right to communicate with government is asserted, it is also recognized that citizens may require the assistance of intermediaries and that, therefore, the practice of lobbying is "a legitimate activity." In recognizing the legitimacy of lobbying, the Act brings that activity into the realm of regulation, though the preamble is careful to assert that the level of regulation introduced by the Act—registration—"should not impede free and open access to government."

As we have seen, the principal virtue of the initial version of the Act was to acknowledge the influence of lobbying and to establish that some form of regulation, though at this stage only registration, was necessary. With the identification of a field of regulation, it became possible to determine the population of the lobbying community and to obtain some understanding of how lobbyists interacted with government. As a result, the second iteration recognized the need for a code of conduct and for providing officials with some authority, albeit limited, to monitor compliance with the Act and, through the Ethics Counsellor, to carry out investigations into lobbying behaviour. The third and most recent version of the Act has strengthened it further by clarifying the language of the Act and by setting out more extensively the powers of the Registrar to issue interpretations and to enquire into non-compliance.

Events occurring during the period that the second version of the Act was in effect revealed major weaknesses in it. By 2001, it had become clear that key wording of the Act was too imprecise to permit prosecution. Two years later, the Auditor General's annual report, by drawing attention to what has become known as the "sponsorship scandal," demonstrated that the Act was certainly not ensuring that "public office holders and the public…[would] know who [was] attempting to influence government." The latest revision of the Act partially addresses the problems identified through these events, but the tightened language and the strengthened authority of the Registrar still leave significant weaknesses.

The chief of these relate to compliance, disclosure, investigation and the independence of the Registrar. They will be discussed individually and followed with a short review of other criticisms of the Act and its administration.

2.1

Compliance

During the public hearings of the Commission of Inquiry into the Sponsorship Program and Advertising Activities, so many witnesses revealed that they had not registered that the Commissioner commented wryly that he had "the impression that nobody registers as a lobbyist. …I haven't heard [of] one case so far."[61] One witness, Alain Renaud, explained that, "I didn't do it because it was standard practice. In the communications field, most people were not registered. So I was not alone."[62] The task of raising compliance rates is a major challenge.

The LRA is a difficult Act to administer. As it is now written, the target population is extensive and does not automatically identify itself. The Act recognizes three classes of lobbyists: consultant lobbyists, corporate lobbyists located within companies, and organization lobbyists working in non-profit organizations. A considerable number of lobbyists in each of these three categories register, but an unknown number do not. They fall into three groups:

- Those who do not know that a lobbyist register exists;
- Those who do not understand that they themselves ought to register; and
- Those who evade registration.

2.1.1 Inadvertent Non-compliance

Interviews suggest that consultant lobbyists and in-house lobbyists associated with major corporations and non-profit organizations are well aware of the registration requirements, and generally do register. Compliance amongst these lobbyists seems to have increased since the revised Act, and its attendant regulations, came into force. Officials and observers agree that this heightened level of compliance is probably due to the more rigorous monitoring of registrations that the current Registrar has initiated and to the tightened wording in the Act that enhances the probability of successfully laying charges (discussed below). However, consultant lobbyists and the in-house lobbyists in major corporations and non-profit organizations form a relatively small community, largely located in Ottawa, in which word of tougher procedures and new requirements spreads rapidly. Members of this community are well aware of the obligation to register.

Outside this community, the *Lobbyists Registration Act* is largely unknown, even though many businesses, universities, hospitals, social service organizations and other non-profit organizations have regular dealings with the federal government, often employing legal advisors and consultants who undertake activities that the Act describes as lobbying.[63] For representatives of many of these organizations, program officers will be their principal contacts with agencies, and therefore one might expect these officials to be aware of the LRA and ready to alert them to its requirements and to those rules that could impinge on the successful completion of a grant or contract proposal. At present, unless the officer has had particular experience with the Registry, this is unlikely. Evidence is impressionistic and scanty, but it does seem that program officers in general are not especially aware of the Act or of the Registry. The extent to which even public servants are unaware of the Act and of related Treasury Board rules was made apparent in September 2005, when the media reported that a probe was being conducted into payments made to lobbyists by a number of high-tech firms that had received financial assistance under the Technology Partnership program.[64] The investigation was looking into the possibility that some of the firms had employed unregistered lobbyists and/or paid them contingency fees, contrary to Treasury Board regulations.

The extent of and reasons for this lack of awareness are not entirely clear as no systematic study has been carried out, but plausible explanations offer themselves. First, the Act has received minimal attention over the 16 years that it has been in effect. Second, the federal government has made few efforts to alert the affected public to the provisions of the Act. Third, professional bodies also appear to have paid little attention to the Act and its requirements. These will be discussed shortly.

2.1.2 Evasion

If it is difficult to estimate non-compliance; it is even harder to say how much non-compliance is inadvertent and how much is due to evasion. As we have seen, non-compliance seems to have been routine amongst a number of the lobbyists who appeared before the Commission of Inquiry. The problem is illustrated by a study of compliance prepared by the consulting firm KPMG for the Office of the Ethics Counsellor. Perforce, apart from 26 corporate counsel of major companies, most of the 150 informants for the study had to be drawn principally from the lobbyists already in compliance, and registered. These informants were asked to estimate the compliance rate of their colleagues. Not surprisingly, "a significant proportion (about a quarter) did not know the compliance rate…[and] of those who made an estimate about a fifth were only guessing."[65] Presumably, the remaining four-fifths were accessing some divine database, because there is no way of knowing how many individuals are, at any one time, communicating with government with a view to influencing public decisions. Bearing in mind the methodological flaws in the KPMG study, its conclusions are still interesting:

> The responses of those who made an estimate indicated that compliance…was perceived to be high, but with a significant margin of non-compliance, for 68% of consultant, 79% of organization, and 100% of corporate lobbyists surveyed.…[As well] 50% of consultant, 20% of organization, and 15% of corporate lobbyists indicated awareness of non-registered lobbying.)[66]

Evasion does not necessarily result from a desire to subvert lawful processes. The KPMG study revealed that an attempt to avoid registration can be rooted in a wish to protect proprietary information. Within the professional lobbying community, the Registry is known as a source of information about the activities of competitors. Consequently, late registration, or a failure to register, can be a way to avoid alerting competitors to new corporate and organizational strategies.

Problems of congruence may also contribute to a reluctance to register, or to fully meet the disclosure requirements. Treasury Board's prohibition against contingency fees appears to fly in the face of the LRA requirement that lobbyists report contingency fee arrangements (section 5(2)(g)), and draws attention to Government's uncertainty over the legitimacy of charging contingency fees.[67] It seems incongruous that a lobbyist can receive a contingency fee if he or she has persuaded the Government to reverse its long-standing policy of opposing the weaponization of space, but not if he or she is successful in selling space weaponry to the Department of National Defence.

The issue of congruence also affects some of the organizations that must file lobbyist registrations. The lobbying activities of charities, for example, are highly regulated.[68] In particular, the Canada Customs and Revenue Agency does not permit them to allocate more than 10% of annual income to lobbying. Yet section 7(1) of the LRA requires these organizations to register when a significant portion of employees' time is occupied in communicating with public office holders concerning legislation, policies or grants, contracts and contributions. The threshold for reporting occurs when one individual devotes 20% of his or her time to lobbying, or when several employees carry out lobbying activities that "would constitute a significant part of the duties of one employee if they were performed by only one employee."[69] As one observer points out, "the metrics are not the same;" nevertheless, charities may find the 20% threshold disconcerting, and an incentive to understate employees' lobbying activity.

An understanding of why evasion occurs does not excuse it, though it may suggest ways in which lobbyists and the organizations they represent can be persuaded to register. By tackling problems of congruence, for example, the Office of the Registrar of Lobbyists (ORL) might make compliance more appealing and thus be able to devote resources to monitoring and investigating cases where evasion is intended to conceal illegal influence. Just how extensive that problem is, is unknown, and the ORL lacks the resources to shed light on it. This lack of resources is currently the most significant factor inhibiting the Office's attempts to track non-compliance.

2.1.3 Sanctions

Enforcement of the current Act has two aspects. Section 14 provides that, on summary conviction, a person who contravenes any part of the Act or its regulations (other than subsection 10.3 (1)), shall be liable to a fine of up to $25,000. A similar penalty applies to individuals who, on summary conviction, are found to have filed misleading or false statements and documents, but in their case, the penalty could also include up to six months imprisonment. Where such a conviction has been arrived at through indictment, the penalty is higher: a fine of up to $100,000, imprisonment for up to two years, or both. Section 14(3) limits the period for instituting proceedings by way of summary conviction to two years. Decisions to prosecute are the responsibility of the Attorney General, not the Registrar.

The second aspect of enforcement has to do with the Code of Conduct. Section 10.3(1) requires that individuals who must be registered shall comply with the Code. Where there are grounds for believing that a breach of the Code has occurred, the Registrar must investigate. In order to carry out the investigation, the Registrar has the same powers to subpoena persons and documents as a superior court of record. If the Registrar's investigation of a suspected breach of the Code uncovers evidence that the LRA itself has been contravened, the investigation of the Code must be suspended until the latter breach is investigated and disposed of by other authorities. If the Registrar concludes that a breach of the Code has taken place, the findings, with supporting evidence, must be filed as a report to Parliament. The report constitutes the major penalty for breaching the Code, although it may be possible to request a prosecution under section 126 of the *Criminal Code*, which provides penalties for wilful breaches of federal laws where no other penalty has been prescribed.

It is important to remember that the Registrar's power to enforce compliance is strictly limited. Registrations can be verified and reviewed and breaches of the Code investigated. Prosecution decisions rest with the Attorney General. The only penalty that the Registrar can impose independently is to file a report of an investigation with Parliament. In the lobbying business, where reputation is an important asset, this can be a significant consequence.

In effect, other penalties may also be exacted by other branches of the federal government when lobbyists or their clients transgress. In the recent case involving the Technology Partnership program, payments to the companies concerned were frozen, and at least one firm agreed to pay back to the Government an amount equal to the contingency fee it had paid the lobbyist. The Government can cancel contracts tainted by failure to observe federal law and regulations, with potentially devastating consequences for the companies concerned. These penalties would not directly affect rogue lobbyists, though companies might seek to obtain damages from them, but it is possible that a reputation for skirting the law would make it difficult for a lobbyist to employ his or her most important asset, the ability to obtain access to decision-makers. Finally, the many lobbyists who are lawyers are subject to professional discipline.

Whether any of these penalties carry weight when lobbyists are considering the pros and cons of registration is difficult to say. At the Commission hearings, a number of lobbyists reported routinely avoiding registration, but others associated with senior government relations and legal firms reported that they registered as a matter of course. Possibly, the latter are chiefly influenced by reputation and professional considerations, rather than by the penalties set out in the LRA. The former may not have been aware that there were penalties for failing to observe the Act. It may be true that sanctions encourage compliance, but only if they are known to exist. Alternatively, the lobbyists who evaded registration may have assumed that the Lobbyist Registration Branch (LRB) would not have the resources needed to investigate them or to enforce compliance.

2.1.4 Information and the Problem of Compliance

Ignorance of the LRA is understandable when we consider the limited publicity given the Act. Until recently, media interest in lobbying regulation has been almost non-existent, and even within government very little guidance has been provided either to public servants or to those doing business with federal agencies. Furthermore, lack of clarity in the Act, and the absence of interpretation, have been major weaknesses.

This study was not equipped to make extensive enquiries about how well public servants have been prepared, through training programs, to address lobbying issues, but information was obtained from the Department of Public Works, which, as the major procurement department, might be expected to pay considerable attention to these matters. There, discussion of lobbying issues is usually included in training modules that deal with ethics. Further guidance is available from the Department's Ethics Directorate.[70] Public Works, however, may be somewhat unusual in this regard. In her 2003 Report, the Auditor General noted that "agencies responsible for major procurements and for grants and contribution programs are making progress in developing and implementing comprehensive values and ethics initiatives." The Auditor General added, however, that "progress is still slow."[71] In agencies responsible for smaller programs, progress may be slower still.

As far as business people and members of the general public are concerned, some information is available from government, but it is elusive. The lobbyists registration website provides useful and easily accessible information about the Act and the *Lobbyists' Code of Conduct*.[72] Several interpretation bulletins and advisory opinions have been prepared, and are posted on the site. Helpful though the site is, however, it is most likely to be used by the professional lobbying community, and not by business executives, their general-practitioner legal advisors, or by organization representatives who are intermittently in contact with the federal government. It is only useful to the person who is aware of the Act and alert to the possibility that he or she may be lobbying. Sites that business people might be expected to consult do not lead readily to the LRA site and contain only cryptic references to conditions like the Treasury Board prohibition on contingency fees.[73]

Nor are business and professional associations very helpful. The Government Relations Institute of Canada, an Ottawa-based organization representing lobbyists, holds seminars and conferences that contribute to the spread of information in the capital. Beyond that limited audience, the Canadian Society of Association Executives publishes a book on government relations which includes information on lobby registration, but the Canadian Chamber of Commerce reports only that it "makes references to the LRA for our members particularly when changes to the Act are made. We have not created a specific guide to the issue."[74] A review of publications of the Canadian Federation of Independent Business since 1999 shows no reports on the subject. Public policies are the subject of many think-tank studies, but discussions of lobbying and its regulation are exceedingly rare.

Contributing further to the obscurity of the Act is the fact that its wording was, and to some extent still is, unclear, leaving considerable room for virtuosic interpretation. Until recently, the Registrar did little to interpret its provisions. In its first iteration, in fact, the Act did not authorize the Registrar to do so, although efforts were made to provide informal advice to registrants.[75] The second version of the Act corrected this omission and the Branch issued two interpretation bulletins and a guide to registration.[76] By October 2005, there were three bulletins and two advisory opinions on the LRA website, but these by no means covered the gamut of issues raised by lobbyists.[77] Given the small staff of the Registrar's Office (the Registrar and seven members of staff), its limited, $737,000, budget[78] and the complexity of issues such as those related to contract discussions, it is hardly surprising that the Registrar has been slow to meet these demands.

2.2

Disclosure

Successive revisions of the LRA have paid special attention to its disclosure requirements. In its earliest form, the Act demanded so little information of registrants that, as it passed through the Commons, it was derisively dubbed "the business card bill." Name, client and subject matter were all that consultant lobbyists had to report. In-house lobbyists simply had to file their names and that of their employer, once a year. Today the disclosure requirements of section 5(2), which consultant lobbyists must meet, runs to a dozen items, ranging from business card information to the identification of the techniques of communication that will be used, to the names of coalition members, to the previous public offices held by the lobbyists, and so on. Section 7(3), which stipulates the disclosure requirements for in-house lobbyists, is even longer.

This expansion of disclosure requirements illustrates the process of political learning that all those involved with lobbyist regulation have gone through since 1985. It particularly reflects the realization that it is not enough to identify who is communicating with government; the public needs to know a good deal more about the reasons for lobbying and the processes that are being used to exert influence. Duff Conacher of Democracy Watch, the principal watch-dog organization concerned with lobbying, maintains that the current Act is misnamed and erroneously frames lobby regulation in terms of registration. He would like it to be renamed *The Lobbying Disclosure Act*, thus placing stress on disclosure of lobbying activity itself. In actuality, such a change of name would recognize a transformation that has largely occurred.

Despite the expansion of disclosure requirements, the public's knowledge of lobbying activity is still limited. The disclosure provisions do not offer members of the general public, or even press gallery journalists, meaningful information about the undertakings reported by lobbyists. Although consultants and specialist journalists can use the registrations to find out what is going on, they treat the information as a pointer, rather than as a direct indication of the purpose of a lobbying undertaking. They rely on background knowledge, experience and well-informed networks to interpret the cryptic listings in the registry. The general public, including non-profit watch-dog groups, has few of these aids to understanding.

There is, therefore, a sense of frustration that fuels calls for further disclosure. Amongst the items that have been suggested for disclosure are:

- The corporate affiliations of volunteer lobbyists;
- The offices lobbyists have held in political parties or work they have performed for candidates;
- Participation in consultations, hearings, roundtables, or like activities, even when such events are on the public record; and
- The cost of lobbying undertakings, or the time lobbyists and volunteers commit to an undertaking.

The call for disclosure of information concerning volunteers comes from Democracy Watch. In its view, the Act, by exempting volunteers from registration, leaves a loophole for corporations to exert pressure on former executives to lobby on their behalf. It has not been possible to prove or disprove this criticism.

The demand for disclosure of the offices lobbyists have held in political parties and their party connections with politicians is more substantial and has been strongly supported by Opposition parties. It stems from the recognition that lobbyists often follow a career path linking the occupations of political operative, assistant to a Minister, and lobbyist, which gives heightened influence to those individuals who have followed that path. A volunteer, for example, who works in the election or leadership campaign of a prominent politician, can move, on the politician's election, to a position in a Minister's office, where he or she establishes a network of political and bureaucratic contacts and acquires knowledge of government processes and some policy fields. At the same time, he or she retains connections with the political party, perhaps occasionally undertaking short-term, full-time work to assist in an election campaign or a leadership bid. Eventually, the individual's experience and range of contacts are strong enough to warrant moving to a lobbying firm where knowledge of government and his or her ready access to influential public office holders is a significant asset.[illegible] None of this is illegal, but it does give the person or firm that can afford to buy the lobbyist's time preferential access to public office holders. It is, therefore, inimical to principles of democratic equality. Critics argue that it is equivalent to the preferential position of former public servants, and should, therefore, warrant disclosure.

The call for disclosure of participation in conferences, roundtables and similar events is as well-grounded as is the call for disclosure of political affiliation, but, as we shall see, more difficult to address. Reviewing the Registrar's recent bulletin entitled "Communicating with federal public office holders," Democracy Watch takes exception to the suggestion that "participation in consultations, hearings, roundtables, or like activities" do not have to be reported "when the name of the participants, the Government participating organizations and the subject matters are readily available publicly." It sees these meetings as opportunities for lobbying, and believes they should be disclosed.[50] This is a valid point. Conferences and similar smaller meetings do provide a place where lobbyists can meet public office holders and attempt to influence them. The suggestion that information about these meetings is on the public record is not satisfactory. Many can indeed be found, chiefly on the web, but only after a difficult and time-consuming search. Furthermore, the information supplied on conference websites is variable, depending on the priorities and perceptions of event organizers.

Finally, demands that the full costs of lobbying should be disclosed have been heard since back-bench members of Parliament first began calling for lobbyist regulation. Those who favour this type of disclosure maintain that the public should be aware of the extent to which interests are prepared to invest in securing public contracts or, more important, significant changes in public policy. Politicians have frequently raised the possibility of requiring lobbyists to report their fees; lobbyists have routinely replied that fees are proprietary information, and in any event, are not a good indication of the true costs of a lobbying undertaking. The latter point is plausible, but leads to the further suggestion that those costs could, and should, be reported. This, in turn, presents a conundrum: A major lobbying campaign is multi-faceted, and expenses will be deployed to a surprisingly wide range of firms and organizations. Payments will be made not only to lobbyists themselves, but to polling firms, advertising agencies, lawyers, accountants, non-profit organizations, and even to charities that espouse the same cause. If one has the skills and information available to a forensic accountant, it may be possible to look at the overall effort involved in a campaign, and arrive at a shrewd guess as to what it all cost. Unfortunately, this assessment would itself be extremely expensive, and would be available to the public, and to policy decision-makers, only long after key decisions had been made.

Nevertheless, the lobbying that engulfs any important public decision is now so extensive that its cost is in itself a matter of public concern. An ordinary member of the public can be forgiven for feeling that industries that are prepared to spend very large sums of money in order to secure favourable public policies may well be expecting to recoup their expenditures at the expense of the taxpayer and consumer. Knowing something of the cost of those campaigns not only alerts the public to the stakes involved,[81] but suggests that some effort should be expended, by the public service and relevant advocacy groups, in giving comparable weight to alternatives to those put forward through well-financed lobbying campaigns.[82]

Closely related to these demands for further disclosure, are proposals, also made by Democracy Watch, that Ministers and senior public servants be required to report meetings between themselves and lobbyists, and that public servants in general must report lobbying and ethics rule violations to the Ethics Commissioner. The suggestion that lobbyists be prohibited from working for a department whilst lobbying its officials can also be treated as an ethics issue. Finally, the organization has pointed to a discrepancy that irks representatives of public interest groups: the inconsistency, and inequity, of the treatment of corporations and non-profit organizations, particularly the fact that associations must meet higher standards of disclosure than the former.

In their reviews of the LRA, House of Commons committees have looked at most of these suggestions. The opinion of the majority members of these committees was summed up by the Zed Committee, and has been quoted earlier. A fixation on "transparency," the Committee pointed out, often "focuses on things we do not yet know about lobbying and by an entirely logical progression, expectations about what should be disclosed take flight."[83] The Committee weighed these demands against the following test:

> [I]s the information being requested from lobbyists genuinely needed to satisfy Canadians that lobbyists' activity is compatible with the public interest, and to help parliamentarians counterbalance the efforts of individual lobbyists with efforts on behalf of ordinary Canadians?[84]

Part 3 of this study considers the same point.

2.3

Investigation

As we have seen, the first version of the LRA did not empower the Registrar to carry out investigations. Later versions authorized the verification of information registered, and extended the statutory limit for prosecutions for failure to comply with the registration requirements from six months to two years. Currently, the Registrar has the power within the statutory period to verify registration information, and to review any suspected breaches of the Act. Breaches of the *Lobbyists' Code of Conduct* can be investigated without regard to a statutory limitation. Whether the Registrar is engaged in a review of a registration or investigating conduct regulated by the Code, the Registrar is obliged under certain circumstances to report inquiries to other authorities.

Under the second version of the Act, several investigations were attempted. One was taken to the point where prosecution was considered. However, the Crown Prosecutor reviewed the provisions of sections 5, 6 and 7 of the Act, which called for the lobbyist to disclose communications with public office holders made "in an attempt to influence" decisions, and concluded that:

> [I]n light of the insufficiency of evidence establishing that an attempt to influence had taken place and given there was no probability of obtaining a condemnation, no criminal accusation would be filed....
>
> The focus on the expression "attempt to influence" entails that in order to successfully obtain a prosecution under sections 5, 6 and 7 one must demonstrate beyond a reasonable doubt that an individual has attempted to influence a public office holder. The criminal nature of the offence requires a very high standard of proof, which is analogous to the standard required to prove the more serious offence of influence peddling under the Criminal Code thereby making it very difficult to secure a conviction under the LRA.[85]

It was as a consequence of this determination that the references to attempts to influence were later deleted from the Act, and lobbying was described in terms of communications "in respect of" legislation, policies and so on.

As a result of these changes, the Registrar now appears to have adequate powers to carry out investigations into breaches of the Act and failure to observe the *Lobbyists' Code of Conduct*. We must now ask whether the ORL has the capacity to do so.

2.4

The Resource Problem

As we have noted, the ORL currently has a staff complement of seven, excluding the Registrar. Successive parliamentary committees have noted with approval the efficiency with which the Branch carried out its responsibilities. Since the role of the Registrar has, until recently, been confined principally to maintaining a list of those lobbyists who have volunteered to register, such praise is empty and misleading. It is true that the Branch successfully mounted an accessible electronic registration system. Approximately 99% of registrations are performed over the Internet. This was, however, the Branch's signal success. The capacity to ensure compliance was, and is, strictly limited.

The business of ensuring compliance encompasses a number of steps. One would, for example, expect the Registrar and the officials of the Branch to be assiduous in publicizing the Registry, taking their message to members of the public service, the broader lobbying community, and the public at large. In addition to establishing the on-line registration process that does exist, one would expect the Branch to verify registrations, scan the media for evidence of non-compliance, conduct inquiries into complaints, and carry out investigations into the more serious allegations of breaches of the Act and the *Code of Conduct*. These activities, of course, would be in addition to preparing documents interpreting the Act and in addition to the periodic presentations to parliamentary committees.

It is difficult to see how these functions can be effectively performed with the staff at hand. The most recent updating of the Registry has elicited 3,700 registrations.[86] While the great bulk of processing these is carried out electronically, staff must inevitably field a number of questions as lobbyists become familiar with the new registration requirements. Post-registration verification can be a time-consuming process, and is followed up with communications between officials and lobbyists as details and corrections are requested and provided. One can appreciate that investigating complaints and conducting inquiries—not to mention the preparation of interpretation bulletins and advisory bulletins, themselves activities that require research and consultation—puts the Office under considerable strain.

Consider, for example, the investigation of complaints. The LRB website provides two reports describing the Registrar's findings in relation to instances of alleged failure to register. In both cases, the Registrar's investigation consisted primarily of interviews with the lobbyists concerned, with their clients, and with the ministers with whom the lobbyists communicated. In order to verify statements made to the Registrar, some further research was conducted into public records. It is not possible to tell from these reports whether or not the Registrar would have undertaken more extensive investigations if more resources had been available. One suspects, however, that the Registrar of the day was doing as much as she could with the resources at her disposal.[87]

It is hardly surprising that the LRB was unable to fulfill the promise of the LRA that "public office holders and the public be able to know who is attempting to influence government." One has to conclude that while the Registrar now has the legal authority to enforce compliance with the *Lobbyists Registration Act*, the Office still lacks the capacity to do so.

2.5

The Independence of the Registrar

Since its inception, critics of the LRA have argued that the Registrar should be independent of the government of the day. They have pointed out that locating the LRB in a government department compromises the independence of the Registrar. The appointment itself is subject to the will of ministers and the appointee, a career civil servant, is vulnerable to pressure from senior members of the bureaucracy, quite apart from the intimidation he or she might feel in the process of reviewing the behaviour of a member of cabinet. The Registrar's officials are similarly vulnerable. The Office itself can be subjected to budget constraints that limit its effectiveness.

The present Registrar holds the rank of Assistant Deputy Minister in the Department of Industry, and is thus more senior than his predecessors. His previous responsibilities had to do with the corporate affairs of the Department. They included monitoring the Department's observance of the *Values and Ethics Code for the Public Service* and management of the internal audit function, two responsibilities akin to the functions of the Registrar and ones that, he points out, did not involve him with the lobbying community. Since the appointment in 2004 of Michael Nelson as Registrar, the position has been established as a full-time one. Mr. Nelson has relinquished the corporate roles that he formerly assumed in the Department. This has included leaving its management team. These steps were taken in the interests of creating "an organizational distance from the rest of Industry Canada." The Office, in other words, must have the same relationship with all departments.[88] Isolation of functions has been taken a step further within the Office. The Registrar does not supervise the review of complaints; rather, the Office enquires into a suspected breach of the *Lobbyists' Code* and reports to him the information needed to make a final decision and report. The Registrar does not report to the Minister of Industry, but rather to Parliament itself; the present Minister has disclaimed authority over the work of the ORL. The Office's budget is expected to be protected and its staff expanded.

It may be that the recent changes will prove to be effective. On the other hand, the fact that the Registrar and the staff of the Office continue to be civil servants and that the Branch itself continues to be located within a department will inevitably create doubt whenever there is reason to look into complaints involving senior officials or Cabinet Ministers. Any Registrar has to be aware that, as a member of the public service, the holder of the position is vulnerable to internal organizational pressures. For example, performance pay could be used to discipline a Registrar perceived to be overly diligent. Again, in theory at least, a Registrar enquiring into the relationship between lobbyists and a senior colleague could be exposed to a conflict of interest.

2.6

Other Weaknesses

The foregoing has looked at the major weaknesses in the current version of the Act and with its administration. However, the most important criticisms of the *Lobbyists Registration Act* and the regime it authorizes have more to do with matters outside its scope than with the provisions of the Act itself. In the interviews conducted for this study, respondents were asked to identify three major weaknesses in the Act. For the most part, they focused on general conditions, rather than on the shortcomings of the Act. A culture of entitlement, for example, was seen as a precondition for the rampant expansion of lobbying and a trend toward illicit lobbying techniques. In such a culture, public office holders are preoccupied with ostentatious displays of material marks of success and with comparisons with peers in the private sector. It is a culture in which self interest trumps the public interest. The politicization of the public service and of routine decision-making was frequently referred to. The revolving door problem was also cited as a serious issue, not only because former public office holders may exploit their knowledge of agency processes and their connections to senior officials for the advantage of their clients, but also because the public's perception of this exploitation undermines confidence in government. In its May 24, 2005, issue, *The Lobby Monitor* looked at the impact lobbying scandals are having on democracy and concluded:

> [I]t is evident that many key actors in the sponsorship file did not bother to comply with the requirements of the *Lobbyists Registration Act*. The uncharitable among us might suggest that these people weren't lobbyists and what they were doing couldn't be called lobbying. Rather it was closer to influence peddling or political fixing. That may be the case, but it still leaves open the lax enforcement of whatever disclosure laws were in place, and the need to address that if similar situations are to be avoided in future.

In fact, many of the weaknesses identified in the Act and its operational regime are best addressed as part of a complex of laws, policies and programs, and because such a system of rules and processes creates the present regime and is integral to further reform, our discussion of remedies to the current weaknesses in the LRA will begin with a short review of the legislative environment in which the Act is embedded.

2.7

Summary: Strengths and Weaknesses of the Act

This discussion has recognized that the *Lobbyists Registration Act* has some important strengths, particularly since its latest revision. The discussion, however, has focused on its current weaknesses, which it described as falling into five areas: (1) securing compliance; (2) providing clear instructions to lobbyists and officials; (3) defining an appropriate disclosure regime; (4) investigating infractions; and (5) ensuring the independence of the Registrar.

Although, as we explored these weaknesses, we identified some problems that can best be resolved through changes to the legislation, in general our discussion has suggested that the current version of the LRA provides a framework for effective registration, even regulation, so that what are needed now are administrative resources equal to the tasks set out in the Act. In this vein, we have referred to the difficulties created by the fact that the Registrar is not independent of the government of the day, and in the next section will suggest legislative changes to resolve that problem. For the most part, though, we have drawn attention to the fact that the public and officials are generally unaware of the requirements of the Act, and have implied that this is a problem best resolved at the administrative level. The same is true of the issues surrounding the investigation of non-compliance. The next section will elaborate on this suggestion.

3 Remedies

The public's business will be conducted with integrity if:

- There is a widespread expectation in society at large that office holders and those who do business with them will act honestly;

- This broad understanding is reinforced by a culture within the public service that encourages office holders at all levels to respect the public trust and to meet the highest ethical and professional standards;
- The means exist whereby the public can know what business is being conducted with and within government, and how that business is carried out; and
- Institutions exist that can dispassionately monitor the conduct of public business and, where necessary, enforce compliance with the ethical and professional standards expected by the public.

Interdependent, mutually reinforcing, these four elements can create an environment of probity. This study is not mandated to consider whether or not an environment of probity exists in Ottawa, but it does have to show how the *Lobbyists Registration Act* (LRA) fits into the complex of cultural forces, laws and policies that are implied by these four elements. For our purposes, the key point to note is that the LRA is one of a group of laws, policies and practices that define standards, dictate processes and provide for their monitoring and enforcement. The *Financial Administration Act*, which empowers Treasury Board to carry out its responsibilities as the Government's financial manager, regulating the awarding of contracts and grants and dictating procedures for handling public moneys, is one of the most important of these. The *Values and Ethics Code for the Public Service* sets out the standards of behaviour expected of public office holders, while the *Conflict of Interest and Post-Employment Code for Public Office Holders* does the same thing for elected officials and Order in Council appointees, and both are buttressed by the *Criminal Code*. The *Canada Elections Act*, by determining the extent to which individuals and organizations can provide support for candidates and parties, attempts to limit the influence of major interests on political leaders. The *Auditor General Act*[59] and the *Access to Information Act* reinforce this web of regulation, as would other measures that have been proposed, such as whistleblower legislation. No one of these fully safeguards the public purse or guarantees integrity in the conduct of public business, but they express our aspirations for integrity in government and, taken together, work towards providing the honest and open prosecution of public business that Canadian society hopes for.

The LRA plays a modest role in this web of regulation. But it is a key strand in the web. Without it, it would be hard to identify the extent of the "revolving door" problem, and so, hard to know whether or not the *Values and Ethics Code for the Public Service* is accomplishing its purpose. Without it, as well, major contributors to and important officials of political parties would not be identified as lobbyists, so that it would be hard to establish a connection between the operations of our political parties and the exercise of influence. The LRA and our elections legislation thus work together to shed light on what has been a murky part of Canadian public life. Again, the provisions of the LRA help to operationalize Treasury Board rules regarding the letting of contracts, identifying, for example, instances in which lobbyists may have received contingency fees for their assistance in obtaining contracts, contrary to Treasury Board rules.

There are two points to make here. First, the LRA's contribution to the regulation of influence is useful, even if modest. Therefore, the weaknesses in the Act that we have identified ought to be addressed, not simply as an attempt to improve an obscure area of regulation, but as part of an overall process of building an environment of probity. Second, the LRA should not express legislative aspirations that are beyond its proper compass. Even though the Act has grown beyond the limited role assigned to it by its earliest progenitors, and is close to becoming, in Duff Conacher's terms, a "lobbying disclosure act," it should not be burdened, for example, with provisions that require the Registrar to determine who can or cannot lobby. The core purpose of the Act is to identify and disclose and, where disclosure is avoided, to review and initiate formal investigation. If the Registrar and the Office do that job well, the other laws, regulations and policies that provide for professional standards, financial probity, the punishment of influence peddling and the monitoring of public business, will work all the more effectively.

With this in mind, we can return to our discussion of the Act's strengths and weaknesses and look at some ways in which the Act and its administration can be enhanced, and so contribute to the overall improvement of the regulation of influence.

3.1

Compliance

In our discussion of the strengths and weaknesses of the Act, we concluded that the most important challenge confronting the Registrar and the Office of the Registrar of Lobbyists (ORL) is that of securing compliance. It is too soon to declare a trend, but there are signs that the recent changes in the LRA and in the Registry have already brought some improvement. These signs include a considerable increase in the number of registrations and the fact that at least one major law firm is warning clients that the new rules and more aggressive monitoring should not be taken lightly. There is also anecdotal evidence that corporate and organizational lobbyists have begun to recognize that "we have to register."[80]

If these are indeed indications of improved compliance, it is likely that the change can be attributed, first, to two amendments to the Act. The decision to substitute the words "communicate in respect of" for the phrase "attempt to influence," has brought more precision to the definition of lobbying. The change in registration processes for in-house corporate lobbyists has placed greater responsibility on the shoulders of senior corporate management, a fact that has not escaped the attention of legal counsel to firms.

There have also been changes at the Lobbyists Registration Branch. Spurred on by the lacklustre image the Branch had acquired, and by the need to address the lack of confidence created by the sponsorship scandal, the staff at the Branch—now re-named the Office of the Registrar of Lobbyists (ORL)—has become more aggressive in reviewing registrations and in broadcasting information about the registration process. The recent investigation of lobbyists failing to conform to the Act has received considerable publicity and will doubtless reinforce these efforts.[91]

Although these steps appear to have brought about considerable improvement in the compliance rate, it seems that they have most affected consultant lobbyists and the representatives of large corporations and non-profit organizations. These constitute the lobbying community that is centred in Ottawa and has colonies in other major cities. It is unlikely that improved compliance in that community will significantly reduce involuntary non-compliance. There will still be many business people and employees of non-profit organizations who do not register because they are not aware of the obligation to register or do not believe that their communications with public office holders amount to lobbying.

It is doubtful that further changes to the LRA or to contiguous codes and legislation would address this problem. It is best addressed as an education issue. What is needed is a multi-faceted outreach program that starts within the public service itself and progresses to the broader lobbying community until, through the mass media, it touches the consciousness of the general public.

The Registrar has recently contacted senior officials across the federal service and offered briefing sessions for top managers. This is a start in the process of alerting public servants to the Act and its requirements. Ultimately, it should lead to automatic inclusion of a module on lobbying and the LRA in training programs offered by individual agencies and by the Canada School of Public Service. The best location for such a module would be the various courses in public sector ethics and ethical decision-making. These courses have champions in departmental ethics officers. If those officers were to be provided with advanced courses on lobbying issues, they would be in a position to encourage development of appropriate modules. They would also be able to act as ambassadors for the ORL within departments.

In addition to a training program, officers and other public office holders need a source of on-going information concerning registration requirements. The LRA website is one such source. A page designed specifically for program officers would be a valuable addition. It would be a point at which attention could be drawn to issues of congruence, such as those we have referred to. Since the LRA is not a piece of legislation that springs immediately to mind when officials and representatives of corporations and organizations first discuss program availability, it would also be useful to ensure that there are hyperlinks between the LRA website and other sites that provide information on programs and on doing business with the federal government. As noted above, this information is far from readily apparent when one explores such websites as the Contracts Canada website or the Treasury Board website. Such sites should draw attention to the Government's commitment to ethical practices and to formal requirements, such as those relating to lobbying.

Finally, the information available to both public servants and the potential lobbying community should be expanded. The interpretation bulletins and advisory opinions posted on the LRA website are a good beginning, but there are still areas that need elucidation, particularly in relation to the exemption accorded to corporate lobbyists for reporting communications regarding the awarding of government contracts.

Given training and these sources of information, alert program officers will take greater care to ensure that the businesses and organizations that they deal with are complying with registration requirements. This should be taken a step further, however. A Treasury Board policy should require that all public office holders, senior officials, political figures and program officers, as a matter of routine, establish the lobbyist status of individuals communicating with them. This would be done by direct question and by verification through the Registry. It is currently possible to verify a registration electronically and there is no reason why such a practice could not become widespread and routine. Such a routine would do much to make representatives of firms and organizations aware of the LRA and to determine whether or not they should register. It would also identify inconsistent reports, which could be followed up by the ORL.

Policies and education programs directed at program officers would go a long way to reduce the apparently high level of inadvertent non-compliance. There is a need, however, to go beyond the public service and to extend knowledge of the LRA and its requirements to the public at large, particularly to enterprises and organizations interacting with the Government. An initial approach to this task would be to involve the specialist press—*The Lobby Monitor* and *The Hill Times*, for example—in feature articles on aspects of lobby registration and regulation, and then move on to the organs of organizations whose members have a special interest in lobbying. The Canadian Chamber of Commerce, the Canadian Federation of Independent Business and the Canadian Society of Association Executives come to mind.[13] These and other organizations would also provide platforms at the national and regional levels for presentations on the subject, and thus a link to the general media.[14]

3.2
Evasion

Inadvertent non-compliance can best be addressed through outreach programs directed at key segments of the public service and at the appropriate communities in general society. A different approach is required if the ORL is to deal satisfactorily with evasion. The recent aggressive monitoring and auditing of registrations is believed to have persuaded some lobbyists to register, but a more direct approach to identifying non-compliance is called for. Currently non-compliance comes to the attention of the Office primarily through complaints originating with watch-dog organizations or members of the lobbying community. Public servants may also draw the attention of the Office to non-compliance. The complaints are reviewed by Office staff and a report is prepared for the Registrar, who decides whether further action is required within the Office or by other authorities.

The suggestions made above for encouraging program officers to routinely check lobbyists registration could be used to assist the Office to identify non-compliance. That is, if public office holders regularly notified the Office of inconsistencies in registration, Office staff could follow up with the lobbyists concerned. Democracy Watch has urged that the *Values and Ethics Code for the Public Service* require officials to report lobbying rule violations to the Registrar. This is a useful suggestion, which might also be effected by simply building a feedback mechanism for apparent inconsistencies into the electronic Registry.

Those who believe that tough sanctions encourage compliance will argue that better compliance might be brought about if sanctions for violations of the Act and the Code were to be increased. But there is little evidence that existing sanctions are having any effect. It is likely that more will be gained from vigorous monitoring, aggressive investigation of breaches of the Lobbyists' Code and increased public awareness than from beefing up current sanctions.

The watch-dog group, Democracy Watch, has noted the lack of an anti-avoidance clause in the Act, and a case might be made for incorporating one like section 246 of the *Income Tax Act*. However, experience with the anti-avoidance clause in the *Income Tax Act* has been "less than straightforward." Introduced in 1988, its interpretation and application has been debated in Canadian courts ever since.[95] Section 246 authorizes the Government to assess the tax payable by a taxpayer without including the avoidance transaction. In effect, the penalty for an avoidance transaction is that the Government can withhold the tax benefit it was meant to create. It is difficult to see how a similar financial penalty could be made part of the *Lobbyists Registration Act*. An anti-avoidance clause, therefore, is not recommended.

Some commentators on the LRA have suggested that the Registrar should be authorized to deny or remove registrations where an investigation has shown that a lobbyist has contravened the *Lobbyists' Code of Conduct*. In some circumstances, this would be a substantial penalty. At present, the Act does not give the Registrar an explicit power to refuse registrations. Were it to do so, further provisions would be needed to ensure that adequate procedures existed to protect the rights of lobbyists under investigation. In turn, these provisions would require administrative support. Given the possible legal and administrative ramifications of according the Registrar this additional power, it is recommended here only that the proposal be given further study.

There are two ways in which current patterns of behaviour that are related to sanctions could be exploited to encourage better compliance. The first has to do with the incentive of maintaining the lobbyist's reputation, and builds on the current requirement that the Registrar report publicly to Parliament the outcome of any investigation into breaches of the *Lobbyists' Code of Conduct*. At present, the subject matter of the Registrar's reports is limited to investigations of breaches of the Code. Convictions resulting from breaches of the Act are not reported to Parliament, and might not be included in the Registrar's Annual Report. In order to give greater force to the publication of investigatory reports and successful prosecutions, the LRA should be amended to increase the ambit of the information to be included in the Annual Report to Parliament. As well, further registrations on the part of the lobbyist should be linked to that Report and to any report made by the Registrar to Parliament which finds that the lobbyist has contravened the Code. This would require an amendment to the Act authorizing the Registrar to attach such information to a registration record.

The second suggestion reverts to a long-standing recommendation on the part of several House of Commons committees that the lobbying community establish a professional organization. The Government Relations Institute of Canada has attempted to fill that role, but has not been well supported by the lobbying community. Perhaps the time has come for the House of Commons to institute an inquiry of its own into lobbying practices, the disciplinary methods available to a professional body to secure acceptable practices, and the means whereby the lobbying community can be persuaded to establish an effective professional organization.

Helpful though these suggestions may be, they will not go far to address the fundamental problem affecting the Office's ability to identify non-compliance. Nearly all of them involve more work for the Office, and the labour pool at the Office, as we have seen, is minuscule. Unless staffing at the Office is considerably increased, significant non-compliance—intentional and inadvertent—will continue. Therefore, it is strongly recommended that budgetary resources and staffing levels be raised to a level that will enable the Office to effectively carry out the responsibilities assigned to it by the *Lobbyists Registration Act*.

3.3
Disclosure

Critics have welcomed the recent extension of disclosure requirements to include lobbyists' previous employment in the public service, but are dissatisfied with the failure to extend the same requirements to positions held in political parties.

Protagonists for democratic equality have taken two approaches to addressing this issue. Some believe that this chain of obligation and influence should be eliminated entirely, and that lobbyists should be barred from political activity and the politically active barred from lobbying. Others argue that transparency demands that lobbyists' connections to public office holders should be publicly known. Transparency, they point out, would not eliminate preferential political access, but it would put the public office holder on notice that the connection is generally known and that therefore he or she must take pains to hold the lobbyist at arm's length and to avoid favouring that person's clients.

The second of these positions appears to be the more feasible. Apart from the possibility that the former might violate fundamental civil rights, the task of enforcing a prohibition would generate complex problems of interpretation as party and Registry officials tried to establish what level of political activity, and which party positions, would render an individual ineligible for lobbying work, what exemptions would apply, and how evasion could be avoided. It is doubtful that the LRA would be the appropriate legislative tool for implementing this approach, and it is certainly out of the question that the ORL, with its current resources, would be able to carry it out. On these grounds, the transparency approach is more appealing, particularly as it would put political operatives on the same footing as former public office holders. However, it would not address the issue of preferential access. Perhaps that issue could be resolved by aligning the *Lobbyists Registration Act* with the *Canada Elections Act*,[96] with the "Financial Administration" portion of the latter Act providing that the value of labour volunteered to a political party or candidate be assessed at a realistic rate and treated as part of the individual's permitted annual contribution to that party. In this way, the extent of an individual's contribution to a party or candidate would be limited and the chain of obligation and influence effectively broken. At the same time, the LRA could be amended to require disclosure of positions held in election, nomination and leadership campaigns and in local, regional, provincial and national party organizations.

Democracy Watch has drawn attention to problems with some exemptions, particularly the exemption for volunteer lobbyists, and has argued that there should be more disclosure of volunteer activity. If, as Democracy Watch maintains, some large corporations are drawing upon retired executives to lobby as volunteers, a remedy could lie in extending the obligation to register to those volunteers who have had previous employment in the firm or organization, with the requirement to disclose the nature of that employment. If, at present, these volunteers are, in fact, receiving some recompense for their efforts, then they are in violation of the Act, and their involvement should be investigated and appropriate penalties applied.

Democracy Watch has also urged that lobbyists be required to report attending conferences and other events that, theoretically at least, are on the public record. It is doubtful whether the disclosure provisions of the LRA could be used to achieve this, and the attempt to list the numerous meetings of this sort, and those who attend them, could truly create a glut of unmanageable information. Perhaps another way to make this information accessible is to require each agency to establish a conference sub-site on its website where the public could access records of all conferences supported in whole or in part by departments. Links could be provided to the sites of conferences attended by agency officials.[97]

The issue of identifying the costs of lobbying vies for importance with the campaign to have political operatives disclose their connections to parties and politicians. As has been pointed out, however, it is extremely difficult to establish what the full costs of a campaign actually are. The conundrum, then, is that the public interest demands some form of disclosure, but that the necessary information cannot be obtained in an affordable or timely manner. The only suggestion that can be made here is that the problem be studied further with a view to devising a disclosure procedure that provides realistic and timely information.

In conclusion, we should revert to earlier discussions of the disclosure issue. The Zed Committee exaggerated when it claimed that "a good portion of the content of (lobbyists') expert advice is available to any citizen who takes the time to become informed about government and the policy process."[98] The Auditor General's 2003 Report was closer to the mark when it pointed out those lobbyists' services "may give… clients the advantage of access to information that is not readily available. This may compromise the public interest."[99] The present study recommends some additions to the disclosure requirements. Care has been taken to avoid recommending disclosure that would create an unmanageable quantity of information. Together with the existing disclosure requirements, these additional items would provide knowledgeable observers with information that can be used to assist the public and lawmakers to know, to understand, and to publicize what lobbying is being done and for what purposes. It is, and always has been, through such observers that the public is alerted to wrongdoing, and it is up to the media and the public at large to make sure that they can be heard.

3.4

The Status of the Registrar

As we have seen, the status of the Registrar is a perennial issue. It was partially addressed through the recent amendments to the LRA, providing that the Registrar shall report to Parliament. Furthermore, the current Registrar has been provided with a level of independence that is much greater than that enjoyed by his predecessors.

These are important steps and it is possible that, with the passage of time, they will institutionalize a degree of autonomy for the Registrar and his or her staff that is consistent with the tasks assigned to them. On the other hand the LRA instructs the Registrar and his or her staff to carry out some duties that are bound, at some point in time, to jeopardize the political standing of a Cabinet Minister, or even a government. The fact that there has been no such public embarrassment since the Act came into effect in 1989 speaks chiefly to the ineffectiveness of its initial provisions and the scanty resources assigned to the Registrar and the Lobbyist Registration Branch (LRB). There have, after all, been a number of political scandals since 1989, and though lobbying has featured in many, the LRA, as it has been articulated and administered, has done very little to carry out its stated purpose of enabling "public office holders and the public…to know who is attempting to influence government."

Despite the improvements that have been made in the Act and in its administration, the Registrar remains a civil servant and the Office is located in the executive part of government. The Registrar is consequently ultimately subject to the pressures that Ministers, and other senior officials, can bring to bear, and the Office is vulnerable to budgetary, staffing and organizational decisions that can, subtly or not, severely limit its effectiveness.

The alternative is to place the Registrar and the Branch under the supervision of Parliament itself. This is an important step. It would certainly be more costly than the present arrangement, even if the same number of officers were to be employed directly on registration, interpretation and investigatory duties, simply because the Branch would require administrative support functions that are currently supplied by its host Department. These extra costs, however, would have to be seen as the costs of ensuring genuine autonomy. The decision to incur those costs would be much less important than the decision on autonomy itself: Would autonomy ensure that the registry delivered information that would enable Canadians to more quickly grasp the significance of the lobbying activities under way? Would autonomy secure better compliance? Would it guarantee more timely verification and more effective and timely monitoring and investigation of lobbying?

The answer to all of these questions is "not necessarily." As a creation of Parliament itself, the Registrar's function would still be overlooked by politicians whose adversarial instincts would be bound to authorize some forms of disclosure and investigation, but whose collective sense of self-preservation would at other times constrain the gathering of information and the carrying out of investigations. For example, would any party, in government or opposition, enthusiastically support the suggestion made above that volunteer party labour be treated as the equivalent of financial donations? Parliamentary bodies can, like Treasury Board, limit resources, and they can review and curtail a mandate.

This being said, however, the great advantage of appointment and regulation by Parliament lies in the fact that the legislature itself is an open forum. It is a centre of media attention and it has an authority that cannot be gainsaid easily at all by agencies in the executive branch. Notwithstanding any proclivity individual MPs may have for secrecy or for protecting the perquisites of their party organizations, the competitive nature of the House and its underlying responsibility for the public interest will in the long run support an agency that is charged with promoting transparency and genuinely enabling "public office holders and the public...to know who is attempting to influence government." For this reason, the Registrar and the Branch should be directly supervised by Parliament.

3.5

Concluding Summary

As one of a group of laws, policies and practices that define standards of probity, dictate processes, and provide for their monitoring and enforcement, the LRA's contribution to the regulation of influence is useful, but modest. Its core purpose is to identify lobbying, disclose its nature and, where evasion occurs, to review and initiate formal investigation. Therefore, in addressing its weaknesses, we should consider improvements that enhance this core purpose, and avoid legislative aspirations that are beyond its scope. Our assumption should be that, if the Act effectively meets the goals set out in its preamble, then the other laws, regulations and policies that provide for professional standards, financial probity, the punishment of influence peddling and the monitoring of public business, will in turn work more effectively.

The issue of non-compliance, especially inadvertent non-compliance, loomed large in our discussion of the weaknesses in the registration regime, and in the suggestions for addressing them. The interviews conducted for this study led to the conclusion that recent changes in the Act and a more aggressive monitoring of registrations on the part of the ORL had had an effect on the lobbying community that is centered in Ottawa, and that that community accounts for the bulk of the improvements in compliance that have occurred. Conversely, there will still be many business people and employees of non-profit organizations outside that community who will be unaware of the LRA.

It was suggested that this problem is best addressed through a multi-faceted outreach program. A number of suggestions were made for such a program, including training for public servants, better and more accessible information, and involving business groups and the media in putting more information about registration before the general public. Training and expanded public knowledge of lobbyist registration should, however, be reinforced with policies that require public servants to be more alert to the registration process and oblige them to establish and, where necessary, report the lobbyist status of individuals communicating with them. We noted, however, that unless staffing at the Office is considerably increased, significant non-compliance—intentional and inadvertent—will continue. More staff is needed to verify registrations, monitor compliance and investigate non-compliance, on the one hand, and to put the outreach program into effect, on the other.

Several suggestions were made to improve disclosure, although, in general, the major challenge, here as elsewhere, lies in securing for the ORL the resources necessary for effective administration of the Act. In response to arguments that political operatives ought to be banned from participating in lobbying, it was suggested that a more effective approach might be to require disclosure of party positions held, and to introduce changes to election finance rules that would equate volunteer time donated to political parties to financial contributions given to the same cause. Other proposals for disclosure related to the previous employment of volunteers and to lobbyists' participation in conferences and meetings.

Finally, the study considered the issue of the Registrar's independence, and concluded, as many others have done, that because, at present, the Registrar is ultimately subject to the pressures that Ministers and other senior officials can bring to bear, and the Office is vulnerable to budgetary, staffing and organizational decisions that can, subtly or not, severely limit its effectiveness, both the Registrar and the Office should be placed under the supervision of Parliament itself.

The overall conclusion reached in this study is that the *Lobbyists Registration Act*, despite some continuing weaknesses, has the potential to contribute effectively to the web of regulation that expresses and attempts to meet Canadians' expectations for integrity in their national government. To realize that potential, however, two principal recommendations are made. First, Parliament must secure the independence of the Registrar and the Office, by making them responsible to it. Second, Parliament must ensure that the Registrar and the Office have administrative resources equal to the tasks assigned to them by the Act.

4 Recommendations

In consequence of this overall conclusion, two principal recommendations are made:

- *First, Parliament should secure the independence of the Registrar and the Office of the Registrar of Lobbyists, by placing the Registrar and the Office under the supervision of Parliament itself; and*

- *Second, Parliament should ensure that budgetary resources and staffing levels be raised to a level that will enable the Registrar and the Office to effectively carry out the responsibilities assigned to them by the Lobbyists Registration Act.*

Other recommendations are as follows:

4.1

Compliance

The problem of inadvertent non-compliance is best addressed as an education issue. An outreach program should be launched to familiarize public servants, lobbyists and the general public with the requirements of the *Lobbyists Registration Act* and related codes and regulations. Within this program:

- Departmental ethics officers should be provided with advanced courses on lobbying issues, and encouraged to act as ambassadors for the ORL within departments;

- Modules on lobbying and the LRA should be included in training programs offered by individual agencies and by the Canada School of Public Service;
- The website of the ORL should be enhanced. A page should be designed specifically to alert program officers to LRA requirements and to related requirements of Treasury Board and other agencies;
- There should be hyperlinks between the ORL website and other sites that provide the public with information on programs and on doing business with the federal government;
- The information available to both public servants and the potential lobbying community should be expanded, through further interpretation bulletins and advisory opinions;
- The Registrar should go beyond the public service to extend knowledge of the LRA and its requirements to the public at large, particularly to enterprises and organizations interacting with the Government. A particular initiative would be to encourage the specialist press and the organs of organizations whose members have an interest in lobbying to carry feature articles on aspects of lobby registration and regulation; and
- This initiative should include speaking engagements by the Registrar to business associations and other organizations whose members may have an interest in lobbying.

4.2

Combating Evasion

In addition to encouraging the recent more aggressive monitoring, verification and investigation activities of the ORL, the study recommends that:

- A Treasury Board policy should require that all public office holders, senior officials, political figures and program officers, as a matter of routine, establish the registration status of lobbyists communicating with them, and the status of the undertakings that are the subject of their communication;

- The same policy should provide that, where inconsistencies in registration occur, public office holders must notify the Office of the Registrar of Lobbyists;
- The LRA should be amended to increase the ambit of the information to be included in the annual report to Parliament;
- Where enquiry by the Registrar has established that a lobbyist has contravened the Act or the Code, and has been reported to Parliament, the ORL website record of further registrations on the part of the lobbyist should be hyper-linked to that report;
- Given the possible legal and administrative ramifications of according the Registrar an explicit power to refuse or remove registrations, the proposal should be given further study; and
- The House of Commons should institute an enquiry into lobbying practices, the disciplinary methods available to a professional body to secure acceptable practices, and the means whereby the lobbying community can be persuaded to establish an effective professional organization.

4.3

Disclosure

- The LRA should be amended to require disclosure of party positions held in election, nomination and leadership campaigns and in local, regional, provincial and national party organizations;
- The *Canada Elections Act* should be amended to provide that the value of labour volunteered to a political party or candidate be assessed at a realistic rate and treated as part of each individual's permitted annual contribution to that party;

- Volunteer lobbyists who have had previous employment in a firm or organization in whose interest they are communicating with public office holders, should be required to disclose the nature of that employment;

- Government agencies should be required to provide websites for the records of all conferences and similar events that they have supported in whole or in part. Links should be provided to the sites of conferences attended by agency officials; and

- The ORL should conduct a study to devise a disclosure procedure that would provide realistic and timely information about the costs of reported lobby undertakings.

Appendix:
Terms of Reference, Method and Acknowledgements

The study was commissioned to address the issues of (1) the independence of the Registrar, (2) the Registrar's powers of investigation, (3) the time limitation on prosecutions, (4) the need to provide meaningful information to Parliament on lobbying activities, and (5) the need for stronger sanctions.

In view of the short time available for the study—about six weeks—it was agreed that no new major research would be undertaken and that there would not be time for any significant investigation of comparative approaches to lobbyist regulation. Research therefore focused on the more recent development of the Act itself and its administration. Interviews were conducted in Ottawa and by telephone with the Registrar and his officials and with a small number of informed observers. Considerable use was made of websites, a number of which were suggested by informants.

The cooperation of officials, particularly the Registrar and his staff, is much appreciated. John Chenier, editor and publisher of *The Lobby Monitor*, generously shared his extensive knowledge of the lobbying scene. Sean Moore, as always, gave excellent advice with patience and good humour. At the Commission of Inquiry, Donald Savoie, Research Director, understood as he smoothed the way for interviews and received drafts, one section at a time. I especially want to thank Anne Hooper, Librarian to the Commission, for her efficient and determined efforts to meet my requests for information, and Laura Snowball, Legal Counsel, for the lucid and precise guidance that she provided as I tried to understand the implications of key phrases in the *Lobbyists Registration Act* and the legal ramifications of proposals for reform. If she, and the others I have mentioned, failed in their efforts to help me "get it right," it is my fault, not theirs.

Endnotes

[1] *The Lobbyists Registration Act*, originally 35-36-37 Elizabeth II c.53, and later, R.S. 1985, c. 44 (4th Supp.).

[2] The informal version of the current Act will be found at the website of the Lobbyist Registration Branch (http://strategis.ic.gc.ca/epic/internet/inlobbyist-lobbyiste.nsf/en/nx00101e.html). The present Act is a consolidation of the *Lobbyists Registration Act*, R.S. 1985, c. 44 (4th Supp.); *An Act to Amend the Lobbyists Registration Act and to make related amendments to other Acts*, S.C. 1995, c. 12, July 25, 1995, January 31, 1996, and the remainder from Bill C-15 on June 11, 2003; and *An Act to amend the Parliament of Canada Act (Ethics Commissioner and Senate Ethics Officer) and other Acts in consequence*, Bill C-4, which came into force on May 17, 2004.

[3] A recurrent debate over the regulation of lobbying had taken place since the late 1960s as a group of backbenchers, from the Liberal, Progressive Conservative and NDP parties, had proposed 19 private members' bills on the subject to the House. Mr. Mulroney's 1985 statement that the time had come to "monitor lobbying activity and to control the lobbying process by providing a reliable and accurate source of information on the activities of lobbyists," prompted the production of a discussion paper (Consumer and Corporate Affairs Canada, *Lobbying and the Registration of Paid Lobbyists* (Ottawa: Supply and Services Canada, 1985)), which was used by the House of Commons Standing Committee on Elections, Privileges and Procedure as the point of departure for hearings on the subject. (See The Committee's "First Report to the House," *Minutes of Proceedings and Evidence* 1/33, 1985-86, 1:26. House of Commons. Standing Committee on Elections Privileges and Procedure, and "First Report to the House regarding Lobbyists and the Registration of Paid Lobbyists," *Minutes of Proceedings and Evidence*, 2/33, 1986-7, 2:21). An account of the debate over the lobbying issue from its inception to 1989 will be found in A. Paul Pross, "The Rise of the Lobbying Issue in Canada: The Business Card Bill," in Grant Jordan, *The Commercial Lobbyists* (Aberdeen: Aberdeen University Press, 1991), pp. 76-95.

[4] *Notes for Remarks by the Honourable Harvie André, Minister of Consumer and Corporate Affairs Canada...to the Press Conference on Lobbying Legislation.* (Ottawa: CCAC, mimeo., June 30, 1987).

[5] André, *Notes for Remarks*. The Committee visited Washington and Sacramento, where it discussed U.S. federal and California regulation of lobbyists with federal and state officials and with lobbyists and legislators, and came away impressed with the problems that arise when the registration system demands too much information of lobbyists. Their conviction that information overkill smothers analysis has been shared by all those involved in subsequent revisions of the Act.

[6] Section 2(f) of the Act defines a public office holder as "any officer or employee of Her Majesty in Right of Canada" and adds that it includes Parliamentarians and staff members working for them, Order in Council appointees (other than judges), members of federal tribunals, boards and commissions, and members of the armed forces and of the RCMP. One has to be careful not to assume that this definition is used in the ethics codes that apply across the federal government. The *Conflict of Interest and Post Employment Code for Public Office Holders*, which is administered by the Ethics Commissioner, defines public office holders as Order in Council appointees; ministers and individuals working for them who are not public servants; lieutenant governors; judges; RCMP officers (except the Commissioner); and certain other designated persons. The *Values and Ethics Code*, which is administered by Treasury Board, does not cover public office holders, as defined by the *Conflict of Interest...Code*. It applies to public servants working in departments and agencies covered by the *Public Service Staff Relations Act* and to individuals working under contract who are deemed, under the *Income Tax Act*, to be employees of the Government. In other words, the coverage of the *Lobbyists Registration Act* is broad, embracing virtually anyone who can be said to be an employee of the federal government.

The recommendations of the Standing Committee on Elections Privileges and Procedure had been more rigorous. They suggested that those engaged in "indirect" lobbying (such as "mapping," advertising and mass mailing) should be required to register; that non-profit organizations provide the same level of information expected of consultant lobbyists; that contingency fees be banned; that the Registrar have adequate powers of investigation; and that sanctions be such as to "make compliance a desirable and necessary goal on the part of lobbyists." See "First Report to the House regarding Lobbyists and the Registration of Paid Lobbyists," *Minutes of Proceedings and Evidence*, 2/33, 1986-7, 2:21.

[8] Public Affairs International (PAI), one of the leading lobbying firms, had suggested that the lobbyist's knowledge is brought to bear in one or other of three ways: by representing interests to government, by providing a "dating" service, or by "mapping" decision processes for clients. Representation is the best known of these activities and involves articulating to officials, politicians and sometimes the general public the needs and views of particular interests. The dating service puts clients in touch with appropriate officials and advises them on how best to present their case. Mapping services help clients develop a strategy for taking the proposal through the entire decision process, basing their advice on the service's familiarity with the structure and personnel of agencies and their ability to keep abreast of changes in decision-making processes and regulatory procedures. PAI, and some other lobbyists, had argued that mapping and dating services should not be covered by the Act since they merely provided clients with advice about their lobbying strategies. Critics of this position argued that in the process of collecting information for clients, lobbyists were in a position to bring some influence to bear on officials.

[9] House of Commons, *Minutes of Proceedings and Evidence of the Sub-Committee on Bill C-43, An Act to amend the Lobbyist Registration Act and to make related amendments to other Acts of the Standing Committee on Industry.* See particularly Issue 20, which contains its report.

[10] House of Commons. *Minutes of Proceedings and Evidence of the Standing Committee on Consumer and Corporate Affairs and Government Operations*, Issue No. 61, June, 1993, p. 1. The issue contained the 9th report of the Committee which was entitled *A Blueprint for Transparency: Review of the Lobbyist Registration Act*. Future references will be to *A Blueprint for Transparency*

[11] *A Blueprint for Transparency*, p. 1.

[12] *Sub-Committee on Bill C-43*, p. 20:15.

[13] Thus corporate and consultant lobbyists would be required to report the names of the corporate affiliates of their employers that would expect to benefit from the successful prosecution of a lobby, and they would also be expected to provide a general description of the business activities of the employing corporations. (*Sub-Committee on Bill C-43*, pp. 20:38-9.)

[14] *Sub-Committee on Bill C-43*, p. 20:34.

[15] *A Blueprint for Transparency*, p. 1.

[16] *Sub-Committee on Bill C-43*, p. 20:18.

[17] *A Blueprint for Transparency*, p. 17, *Sub-Committee on Bill C-43*, p. 20:21.

[18] *A Blueprint for Transparency*, p. 16.

[19] *Sub-Committee on Bill C-43*, p. 20:24.

[20] *A Blueprint for Transparency*, p. 1.

[21] *Sub-Committee on Bill C-43*, p. 20:23.

[22] *Sub-Committee on Bill C-43*, p. 20:24.

[23] *Sub-Committee on Bill C-43*, p. 20:25. This does not address the possibility that consultations might be prompted by collusion between officials and lobbyists.

[24] *Sub-Committee on Bill C-43*, p. 20:19.

[25] *A Blueprint for Transparency*, p. 15.

[26] *Sub-Committee on Bill C-43*, p. 20:30.

[27] *Sub-Committee on Bill C-43*, p. 20:30.

[28] *Sub-Committee on Bill C-43*, p. 20:31. See also Appendices A and B.

[29] *Sub-Committee on Bill C-43*, pp. 20:34-35.

[30] *Sub-Committee on Bill C-43*, pp. 20:37-38.

[31] *Sub-Committee on Bill C-43*, p. 20:51.

[32] *Sub-Committee on Bill C-43*, p. 20:35.

[33] *Sub-Committee on Bill C-43*, pp. 20:35-36.

[34] *Sub-Committee on Bill C-43*, p. 20:41.

[35] Although the best known of these, Stevie Cameron's book *On the Take: Crime, Corruption and Greed in the Mulroney Years* (Toronto: Macfarlane, Walter and Ross), was published in 1994, her commentaries, and those of other journalists, had focussed on the theme of corruption and lobbying for months before the 1993 election. As John Crosbie stated bitterly, the organizers of the Progressive Conservative bid for re-election were "spooked by the polls" and "believed that the legacy of Brian Mulroney would be an election liability, that our government's record would pave the way to defeat." (*No Holds Barred: My Life in Politics* (Toronto: McLelland and Stewart, 1997), pp. 259-260.)

[36] *Sub-Committee on Bill C-43*, p. 20:45.

[37] *Sub-Committee on Bill C-43*, p. 20:45.

[38] *Sub-Committee on Bill C-43*, p. 20:46.

[39] *Sub-Committee on Bill C-43*, p. 20:47.

[40] *A Blueprint for Transparency*, p. 2, and *passim*.

[41] *Sub-Committee on Bill C-43*, p. 20:52.

[42] *Sub-Committee on Bill C-43*, p. 20:54.

[43] *Sub-Committee on Bill C-43*, p. 20:55.

[44] *Sub-Committee on Bill C-43*, p. 20:55.

[45] *Sub-Committee on Bill C-43*, pp. 20:55-56.

[46] *Sub-Committee on Bill C-43*, p. 20:56.

[47] *Sub-Committee on Bill C-43*, p. 20:56.

[48] *Sub-Committee on Bill C-43*, p. 20:57.

[49] *Sub-Committee on Bill C-43*, p. 20:59.

[50] Lobbyist Registration Branch. *New Regulations (June 2005)*. 'General Information' at http://strategis.ic.gc.ca/epic/internet/inlobbyist-lobbyiste.nsf/en/nx00105e.html. As of 8/26/2005 at p. 1/2.

[51] "Regulations Amending the Lobbyists Registration Regulations" *Canada Gazette*, vol. 138, no. 51 (December 18, 2004), p. 1/16.

[52] Section 7(1) of the LRA requires organizations to register employees when a significant portion of employees' time is occupied in communicating with public office holders concerning legislation, policies or grants, contracts and contributions. The threshold for reporting occurs when one individual devotes 20% of his or her time to lobbying, or when several employees carry out lobbying activities that "would constitute a significant part of the duties of one employee if they were performed by only one employee."

[53] *Canada Gazette* 138/51 p. 3/16.

[54] *Canada Gazette* 138/51 p. 3/16.

[55] LRA, s. 10.4.

[56] LRA, s. 5(2)(h.1).

[57] LRA, s. 5 (1.1).

[58] In the Preamble and the disclosure sections.

[59] As, for example, in provisions clarifying the investigatory roles of the Registrar and police.

[60] The intense media and political interest in the *Lobbyists Registration Act* during the fall of 2005 led both the Government and the Opposition parties to propose changes to the Act at the time Parts II and III were being written. Some administrative changes were also introduced. As the first draft of the study had to be submitted in early October, and as it was not possible to carry out major revisions after that, it was decided that the study would not consider any events occurring after November 1, 2005.

[61] Commission of Inquiry into the Sponsorship Program and Advertising Activities, *Public Hearing* (Translation), Vol. 110, p. 20193.

[62] Commission of Inquiry into the Sponsorship Program and Advertising Activities, *Public Hearing* (Translation), Vol. 96, p. 17136.

[63] To test this statement, in mid-October 2005, the Registry was checked to see whether five of the country's leading universities were registered. Only one had registered its president and senior officials whose duties would include spending a significant part of their time communicating with the federal government. Only one of three national environmental organizations appeared to have registered. Corporate registrations were more difficult to check.

[64] "Dingwall at centre of probe into lobby payments," *Globe and Mail*, Sept. 25, 2005, A1 and A9.

[65] KPMG Consulting, *Study on Compliance under the Lobbyists Registration Act. Final Report* (Prepared for Office of the Ethics Counsellor. Ottawa. September 14, 2001), p. 1.

[66] KPMG. *Study on Compliance*, p. 1.

[67] A useful discussion of the contingency fee issue is found in the October 5, 2005 edition of *The Lobby Monitor*, vol. 16, no. 19.

[68] These are discussed in A. Paul Pross and Kernaghan R. Webb, "Embedded Regulation: Advocacy and the Federal Regulation of Public Interest Groups" in Kathy L. Brock (ed.), *Delicate Dances: Public Policy and the Nonprofit Sector* (Kingston, Ont.: Queen's University. School of Policy Studies. Public Policy and the Third Sector Series, 2003).

[69] Section 7(1)(b). The 20% rule is expounded in the LRB Interpretation Bulletin, "A Significant Part of Duties."

[70] Personal communication, 04/10/05. I am grateful to officials at Public Works for providing me with a summary of the steps the Department takes to educate staff on lobbying issues.

[71] Auditor General of Canada. *Report* (Ottawa, November 2003), Chapter 2: "Accountability and Ethics in Government," s. 2.82.

[72] References to the website do not take into account any changes that may have been made after November 1, 2005.

[73] Http://www.contractscanada.gc.ca/en/busin-e.htm states simply that contracts must "stand the test of public scrutiny, increase access, encourage competition and reflect fairness," and the only reference to lobbying in the Treasury Board policy statement on contracts is to the ban on contingency fees.

[74] E-mail. M. Murphy to P. Pross. Oct. 7, 2005.

[75] The Registrar's early annual reports note considerable numbers of telephone enquiries about the mechanics of registration and the requirements of the Act.

[76] See the Lobbyists Registration Branch. *Annual Report 1995-96*, Section 5.

[77] *The Lobby Monitor* for March 29, 2005 reported, for example, that the Government Relations Institute of Canada, which represents the professional lobbying community, has been pressing for further

interpretations, especially in relation to the new disclosure requirements regarding previous public sector employment and the stricter view of communications with public office holders. This stricter view has had an impact on the mapping activities of lobbyists, which one described as being "the bulk" of lobbying in Ottawa. It is common for lobbyists who are seeking information about policies and contracts to insert into their queries questions that hint at possible policy directions. ("What is the Government thinking about....?" or "Has the Government thought of....?"). Where such interviews deal with highly sensitive issues, cautious lobbyists will register as a matter of course. Not all will do so, however, and doubtless there will ultimately be a need for further interpretation bulletins on such points. The bulletins on the LRA website as of October 18, 2005, dealt with the meaning of the phrases "a significant part of duties" of corporate and organization employees; "communicating with public office holders;" and disclosure of previous public offices. Advisory opinions were also available for those interested in the role of members of boards of directors and the registration requirements applicable to individuals in the academic world.

[78] Personal communication. M. Nelson, Registrar of Lobbyists, to P. Pross. Nov. 1, 2005.

[79] Although this description is hypothetical, Beryl Wajsman, in testimony before the Commission, describes a similar pattern. See Commission of Inquiry into the Sponsorship Program and Advertising Activities *Public Hearing* (Translation), vol. 119 (May 13, 2005).

[80] Democracy Watch. "Federal lobbying law still has loopholes and the enforcer of the *Lobbyists Code of Conduct* still lacks needed independence and resources." Letter by Duff Conacher to the *Hill Times*, July 4, 2005. Also located at http://www.dwatch.ca/camp/OpEdJul0405.html.

[81] John Chenier, editor of *The Lobby Monitor*, noted in testimony before the House of Commons Standing Committee on Industry, Science, and Technology that recent U.S. state legislation has begun to include "a component to identify the expenditures involved in lobby campaigns in order to provide some measure of (the) intensity of the campaign, as well as who is involved" (*Proceedings and Evidence*, April 24, 2005). The *Monitor* frequently cites U.S. data on lobbying activity. Its October 2003 issue commented on a study by the Annenburg Public Policy Center at the University of Pennsylvania which looked at lobby advertising. It reported that in 2001 and 2002 lobbies spent $105 million in the Washington, D.C. area alone on advertising relating to issues before the President and Congress. Eleven organizations spent 40% of this amount. In addition to drawing attention to the big spenders, the study found a correlation between heavy spending on advertising and policy success. It warned that "organizations that are spending large amounts regularly to influence public policy may be of greater concern than the occasional large spender because this could indicate that a small sector of the public is consistently having more influence on issues of public policy." *The Lobby Monitor* 15 (October 29, 2003) 1, pp. 6-7.

[82] This issue, like the argument that public interest groups are discriminated against by the LRA, impinges on a concern that has troubled supporters of public interest groups for a number of years. That is, that commercial enterprises can treat the costs of lobbying as legitimate business expenses. Since such expenses reduce corporate taxes, the public is, in effect, paying part of the costs of lobbying its own government. This is offensive to public interest groups on several grounds. First, such groups are themselves required to report such sums as they receive from government. Second, charities — which constitute a large proportion of Canada's active public interest groups — face strict regulations governing their expenditure on lobbying. However worthy their cause, no one charity can spend more than 10% of its annual income on lobbying. Furthermore, there are even stricter regulations prohibiting politically partisan advocacy and some forms of policy advocacy. Third, corporations' capacity to raise funds for lobbying far exceeds that of public interest groups. Many such groups have registered as charities because the tax incentive for charitable donations does encourage donations. Those that have determined to remain as non-profit organizations in order to avoid the advocacy restrictions applied to charities, find that public financial support is quite limited. In short, neither group has the resources, or in many cases is permitted, to challenge corporate lobbying on anything like equal terms.

[83] *Sub-Committee on Bill C-43*, p. 20:19.

[84] *Sub-Committee on Bill C-43*, p. 20:18.

[85] Letter. Diane Champagne-Paul, Registrar, Lobbyists Registration, to Richard Dupuis, Clerk, House of Commons Standing Committee on Industry, Science and Technology. April 30, 2001.

[86] Personal communication. Michael Nelson, Registrar of Lobbyists, to P. Pross. Nov. 1, 2005.

[87] Attempts to speak with Ms. Champagne-Paul were unsuccessful.

[88] Interview. September 21, 2005.

[89] Consolidated Statutes and Regulations. 1976-77, c. 34.

[90] Interviews. September 20 and 21, 2005.

[91] "Dingwall at centre of probe into lobby payments," *Globe and Mail*, Sept. 25, 2005, A1 and A9.

[92] Http://strategis.ic.gc.ca/lobby.

[93] The Canadian Society of Association Executives has shown interest in lobbying issues in the past, often commenting on them in its journal and publishing *A Guide to Government Relations for Directors of Not-for-Profit Organizations*, by Huw Williams and Lou Riccoboni, which includes a section on the LRA.

[94] In fact the Branch has begun doing this at the national level. Pierre Ricard-Desjardins, Deputy Director of the ORL, recently made a presentation on "The *Amended Lobbyists Registration Act*" at an Ottawa conference entitled "Risky Business," September 15, 2005. The need, however, is for information to reach beyond Ottawa.

[95] The Supreme Court of Canada released its first two decisions dealing with section 246 on October 19, 2005 (*Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54; *Mathew v. Canada*, 2005 SCC 55).

[96] Consolidated Statutes and Regulations, 2000, c. 9.

[97] Such sub-sites would not only assist lobbying watchdogs, they would be a boon to individuals, within and outside government, interested in the substantive topics covered by conferences.

[98] *Sub-committee on Bill C-43*, p. 24.

[99] Auditor General, *Report*, 2003, para. 2.76.

FOR THE WANT OF A NAIL: THE ROLE OF INTERNAL AUDIT IN THE SPONSORSHIP SCANDAL

Liane E. Benoit and C.E.S. (Ned) Franks

Preface

This study of the internal audit processes in the Government of Canada was performed by Liane Benoit under the direction of C.E.S. Franks. The study proved difficult to conduct for three reasons. First, so little has been published about the internal audit function in the Government of Canada that there were no academic foundations on which to build. The study had to be done from scratch in a field of special importance because the Gomery Inquiry, and the inquiry of the Public Accounts Committee that had preceded it, had shown that deficiencies in the internal audit had contributed to the continuation and aggravation of problems in the Sponsorship Program.

Second, while the study was being conducted, Treasury Board introduced a set of reforms to the Government's internal audit procedures that will substantially change the way the Government conducts its internal audit.[1] These proposals had to be taken into account in the study.

Third, the first report of the Gomery Commission, which was released while the study was underway, examines the failures of the internal audit to detect and correct the problems in the Sponsorship Program.[2] Nevertheless, the failures in internal audit are so important that we have included a section on that topic in this paper.

The authors are grateful for the assistance of many individuals and organizations in the research. The paper presents the views of the authors, views which are not necessarily those of the persons and groups who helped in the research. The virtues of the study belong to those individuals and organizations; the faults belong to the authors.

The subject of internal audit is far more important than its neglect by students of public administration suggests. We hope and trust that this study will lead to further discussion and analysis, as well as a better understanding of the internal audit function in Canadian government.

1 Internal Audit as Protagonist

1.1

Introduction

> For want of a nail the shoe was lost. For want of a shoe the horse was lost. For want of a horse the rider was lost. For want of a rider the battle was lost. For the want of a battle, the kingdom was lost. All for the want of care, of a horseshoe nail.

This traditional children's nursery rhyme, a proverb about the larger consequences of seemingly minor actions, might well offer pundits and scholars the most concise analysis of the role played by internal audit in the complex series of events that ultimately led to what is now known as the "sponsorship scandal." There is evidence to suggest that the inability of the internal auditors at Public Works and Government Services Canada (PWGSC) to adequately detect, analyze and/or articulate to senior managers the true nature and seriousness of the irregularities that were occurring within the Sponsorship Program in the mid- to late-1990s played a critical, if not pivotal, role in the ensuing chronology of cascading political events. It was the Auditor General herself who suggested such a thesis when she concluded in her 2003 investigation into three Groupaction sponsorship contracts that, "[t]hese violations were neither detected, prevented, nor reported for over four years because of the almost total collapse of oversight mechanisms and essential controls."[1]

Could internal audit be the unlikely protagonist in this scenario? Through a thorough examination of events, this study will attempt to illustrate how the auditors at PWGSC failed in their duty to inform senior management of the seriousness of the deficiencies, thus depriving management of the opportunity to stop the dominoes from falling. This study will also show how, in a sense, the auditors became almost complicit in perpetuating the wrongdoing by obfuscating the true nature and extent of the irregularities, providing to management assurances that could not be adequately supported by the scope of the audits undertaken, and refusing to report in clear and uncompromising language the serious and potentially fraudulent nature of the matters that were occurring beneath their collective investigative noses.

While many of these failures of internal audit might be explained by questionable levels of competence or judgment on the part of PWGSC auditors, it is equally apparent that the blame for this breakdown in oversight cannot to be laid solely and completely at the auditors' door. Why the system failed to adequately address and thereby pre-empt the mismanagement of advertising contracts that was first detected as far back as 1994 might be as much attributable to the political (both big and small "p") context in which these investigations and decisions were being taken as it is to any negligence on the part of those responsible for such assessments. Shedding light on the audit environment in which these affairs were undertaken requires two things: first, an examination of the culture of the bureaucratic environment in which internal audits operate, including the many structural and institutional conundrums that exist to frustrate the auditors' ability to provide reliable assessments; and second, an examination of the idiosyncratic circumstances and political context in which these specific events were incubated.

A review of the academic literature with regard to internal audit is singularly unhelpful in this analysis, in that few scholars of political science or public administration appear to have considered this subject in any great depth. While professional institutes such as the Institute of Internal Auditors publish many learned papers on the various mechanics and methodologies of the process, the only assessment of the role of internal auditor as political protagonist is to be found in David Good's book, *The Politics of Public Management: The Human Resources Development Canada (HRDC) Audit of Grants and Contributions*. The author was serving as an Assistant Deputy Minister at HRDC at the time when the release of a report by that Department's internal audit group resulted in what was quickly characterized in the media as "a billion dollar boondoggle." In his inside account of the scandal, he offers a candid review of the role played by an internal audit in that affair. His reflections provide some interesting comparative insights into the failings and foibles that have plagued, and continue to frustrate, the workings of this oversight function, and into the institutional, cultural and systemic factors at play that conspire to influence the perceptions and actions of those involved.

These and other issues will require exploration if we are to arrive at any reasonable assessment of how the "shoe" was lost at PWGSC and, more important, how the Government can ensure that such an episode is not repeated.

1.2

Early Warnings

Had internal audit heeded the recommendation of one of its own in 1995, the high profile corruption and flagrant mismanagement that surrounds the Sponsorship Program might never have occurred. In that year, the Assistant Director of the PWGSC Audit Branch, Ms. Julia Ginley, was asked to undertake a "consulting assignment"[1] at the bequest of the then Assistant Deputy Minister (ADM), Mr. Bill Neville, to assist in the development of an appropriate management control framework for a newly created sector, the Advertising and Public Opinion Research Sector (APORS). Mr. Norman Steinberg, the Director of the Audit and Review Branch[2] of PWGSC, in his testimony before the Sponsorship Inquiry, explained the genesis of this assignment:

> [T]he Assistant Deputy Minister at the time, Mr. Neville, who was in the process of putting together this organization, came to us...and asked us "If I put this sort of management control framework in place would it be robust, would it be rigorous?"...What we were telling him is—first of all, we wanted to find out from him what kind of environment he was establishing the program, what were the risks that this program would be faced with. On the basis of that we could give him some reasonable advice in terms of what would be the appropriate management control framework and where its deficiencies would lie.[3]

There was good reason why the ADM responsible for this newly constituted sector might have wished to ensure a robust financial control framework to guide its management. Until its creation that year, the administration of advertising contracts within PWGSC had been divided between two separate groups. The first, the Advertising Management Group (AMG) under the direction of Mr. Charles (Chuck) Guité, was responsible for selecting advertising firms and monitoring the quality and effectiveness of government advertising. The second was a separate procurement team headed by Mr. Allan Cutler and housed within the mainstream procurement division of PWGSC, called the Public Relations and Print Contract Services Sector (PRPCSS). Mr. Cutler's group was responsible for negotiating the contracts, including terms and prices, with the agencies chosen by the first group, AMG. The two groups operated independently from separate offices at different locations and, according to testimony from Mr. Cutler, had very little contact.

This division of responsibilities between the two groups served as one of the institutional "checks and balances" in awarding government advertising contracts, making it difficult for one side to deviate from the rules without the other side being alerted to the irregularity. According to Mr. Cutler, until the mid 1990s, despite this institutional tension, the two groups had never experienced any friction. By 1994, however, that changed. As Mr. Cutler explained before the Public Accounts Committee:

> Sometime around 1990, Mr. Guité became head of the advertising management group (AMG). In 1994, Mr. Guité began interfering in the contracting process by authorizing agencies to carry out work without a pre-existing contract. This led to a meeting on November 17, 1994, between Mr. Guité and the advertising contracting group—my group—at PWGSC, including me.... At this meeting, Mr. Guité told us that the normal rules and regulations should not apply to advertising. He said he would talk to the Minister to have them changed.
>
> A week later, I was informed that I and two other employees who worked for me would move to Mr. Guité's section and report to him directly. At this point in time, Mr. Guité's responsibilities were expanded to include not only the selection of advertising agencies,

> but also the negotiation and awarding of contracts to selected agencies. At this time, he also became responsible for procurement of public opinion research services. As part of this change, I was physically relocated to Mr. Guité's group, which operated from an office that was completely separate from other PWGSC offices.[7]

The amalgamation of these two groups into APORS under the direction of Mr. Guité in effect removed the institutional check that had previously existed in the advertising contract process, and it was the development of a new management control framework for that sector that led the ADM, Mr. Neville, to seek the advice and assistance of the Audit and Review Branch.

The study that was conducted in response to this request involved a series of interviews with members of the new advertising unit, APORS, as well as with their "clients" in other government departments. During one such interview, Ms. Ginley, the PWGSC auditor in charge of this assignment, was told that the client Department's own advertising people felt they were being shut out of the contracting process managed by APORS and, as a result, were now being forced to pay advertising rates negotiated exclusively by PWGSC that were as much as a third higher than current market rates. Ms. Ginley wrote to Mr. Guité to advise him of the client's concerns. She testified at the Sponsorship Inquiry that she had assumed that, once informed of the problem, Mr. Guité would remedy the matter in the next round of contract negotiations.

Ms. Ginley's approach in advising Mr. Guité directly of the problem identified by her research was consistent with federal auditing department practice whereby line managers are informed and given full opportunity to respond to and rectify any deficiencies that might be uncovered by the auditors in the course of their work. In most cases, the redress for administrative irregularities takes the form of an action plan detailing the steps management intends to take to remedy the situation. The action plan, along with the auditor's report, is then submitted for review and approval to the Audit and Review Committee, an internal oversight body normally chaired by the Deputy Minister and made up of three or more senior managers, usually at the ADM level. In this case, however, the fact that the complaint had arisen in the context of consulting work rather than through an audit process meant that no formal response was required of Mr. Guité.

Other financial and management risk factors associated with APORS came to light during Ms. Ginley's research. In her interview with Mr. Guité, she noted his statement that he met once a week with the Minister's Chief of Staff, a relationship that she recognized as highly unusual for a public servant of his status and classification. Mr. Guité admitted that political sensitivities associated with the job were "heavy but sporadic,"[8] and she noted that he had a paper shredder beside his desk. Her observations on the idiosyncratic nature of the unit were further corroborated by her interview with Mr. Cutler. Her notes from that meeting foreshadowed the evolution of future events when she wrote, "political sensitivities – allegations of bid rigging, or complaints to minister. Answer is to follow the rules religiously."[9]

The complaint of the client Department, coupled with the evidence of the unusual political relationships associated with APORS activities, led Ms. Ginley to conclude that the advertising unit represented a significant level of risk to the Department. In her final report to the ADM, Mr. Neville, she included a strong recommendation that once the APORS management control framework was put in place, a compliance audit of APORS contracting practices should be undertaken.

Ms. Ginley's work represented the first opportunity afforded the Audit and Review Branch to investigate and potentially expose the early irregularities occurring within Mr. Guité's domain. So why was the recommendation for a compliance audit not followed? According to the testimony of Mr. Steinberg, the head of the Audit and Review Branch, the recommendation was put forward by Ms. Ginley in February 1995. The next opportunity for APORS to be considered for the Department's annual roster of audits was six months later, in the fall of that year, when the audit schedule for the 1995-1996 fiscal year was determined. Mr. Steinberg indicated that about 30 audits are routinely conducted at PWGSC every year out of a list of 160 different audit elements.[10] Who to audit was decided according to the Department's risk assessment analysis—in other words, its evaluation of which activities within the Department might pose the greatest risk of impropriety or non-compliance with Treasury Board policies, departmental regulations or the *Financial Administration Act* in any given year. Mr. Steinberg's testimony was silent as to why Ms. Ginley's recommendation for a compliance audit was not pursued:

> Julia would have participated [in the selection process] as one of our business managers in providing input in terms of which of the audit elements she had knowledge of and responsibility for. She would recommend it to be included in the Audit Plan and through the process of iteration, the ultimate plan gets decided. So Julia would have had an opportunity to make a recommendation that this audit should go forward.[11]

APORS was again among those sectors considered in the Department's deliberations for audits to be conducted in the 1996-1997 fiscal year. Mr. Steinberg testified at the Sponsorship Inquiry that on that occasion APORS was included on the preliminary list, but it failed to make the final roster:

> Indeed, when we were in our 1996-97 mode, this APORS audit was listed as a potential audit to be done, but it was, in terms of the prioritization of audits that we were doing, it fell below the line of our available resources to do.[12]

By 1996, life in Mr. Guité's sector had become increasingly difficult for the procurement specialist, Mr. Cutler. Mr. Cutler was, by his own admission, "an extremely professional buyer" who had been "trained well by a number of highly qualified individuals over the years." He had become increasingly concerned with APORS contracting practices since he and his then superior, Mr. Pierre Tremblay (a different Pierre Tremblay than the Honourable Alfonso Gagliano's Executive Assistant), had first confronted Mr. Guité over irregularities at the meeting in 1994, and what he had witnessed since his move from the PWGSC procurement mainstream into the APORS unit had not lessened any of his professional discomfort. According to his testimony before the Public Accounts Committee:

> Contracts were regularly backdated; commissions were paid for services apparently not performed; there appeared to be improper advance payments; in circumstances where ministerial, Treasury Board or legal authorization were required, they were not sought; contracts were issued without prior financial authorization.[13]

Mr. Cutler again confronted Mr. Guité over these contracting irregularities in February 1995. He testified that Mr. Guité became quite upset and gave him the strong impression that his job was in jeopardy.[14] Shortly after, Mr. Guité informed Mr. Cutler that in future he would be reporting to Mr. Mario Parent. The implications of this move were not lost on the career public servant. Not only was it, professionally speaking, a loss of face to no longer be reporting directly to the head of the sector, but the insult was exacerbated by the fact that his new "boss" held a position in the civil service hierarchy that was a level below Mr. Cutler's. In imposing this new reporting line, Mr. Guité had offered Mr. Cutler a choice—report to Mr. Parent or be placed on the priority list, a move that in the environment of severe cutbacks and downsizing of the mid-1990s meant he would be out of a job within six months. Shaken by the potential implications to his career and aware of the need to protect himself in case of future retaliation, Mr. Cutler began to keep copies of documents and a log recording details of any contracts he was asked to process that he considered questionable or improper.[15] A little over a year later, in April 1996, he refused instructions from Mr. Parent to sign an approval authority on a contract that Mr. Cutler determined to be irregular. Mr. Parent warned him that he would have to "suffer the consequences"[16] and "pay a price"[17] for that refusal.

It was at this point that Mr. Cutler approached his union, the Professional Institute of the Public Service (PIPS), and advised it of the contracting irregularities he was observing, and the history of the intimidation and threats against him by his superiors. In response, PIPS sent a letter on May 13, 1996, to the Assistant Deputy Minister for Government Operations Services Branch, Mr. Jim Stobbe, who in turn requested that Mr. Cutler bring his documented evidence to the Audit and Review Branch of PWGSC so that it could evaluate the legitimacy of his complaints.

Two weeks later, the Audit and Review Branch met with Mr. Cutler to review the allegations and the evidence he had amassed over the previous 14 months. In a report dated June 7, 1996, the auditors confirmed that Mr. Cutler's allegations about contracting irregularities at APORS were founded.[18] After a second interview with Mr. Cutler on June 10, 1996, the Audit and Review Branch informed the ADM that there was sufficient evidence to warrant further investigation. Notes taken during that period at a meeting between Mr. Stobbe and members of the Audit and Review Branch indicate that the ADM was not in favour of an audit. However, in reviewing the findings of preliminary investigations, the Director, Mr. Steinberg, felt that a further investigation of APORS contracting practices was warranted.

Curiously, it was on June 11, 1996, one day after Mr. Cutler met with members of the Audit and Review Branch for a second time and passed on to them further documentation, that he was invited into Mr. Guité's office and told that his position had been declared surplus. While

Mr. Guité claimed his decision had nothing to do with Mr. Cutler's disclosures, there can be little doubt that this was the compelling factor in that decision. In fact, this move likely satisfied two objectives for Mr. Guité. It initiated a process that would rid his unit of the dreaded "snitch" in advance of an anticipated expansion of Mr. Guité's duties and authority within the Sponsorship Program, and it sent a warning to all other members of APORS about what might happen should they also be inclined to question his authority. Interestingly, no one in senior management, all of whom were aware of what was happening to Mr. Cutler, came to his defence in light of these developments. No one intervened to protect his career or to sanction Mr. Guité for his obvious ruthlessness in the matter. On the contrary, Mr. Guité's star continued to rise unimpeded, as if proof of the old Ottawa saying that, in government, "heads roll uphill."

1.3

The Ernst & Young Audit

Much might be made of the fact that the internal audit of APORS that was instigated by Mr. Cutler's disclosures in 1996 was conducted by an outside firm. While contracting out may at first glance suggest a level of independence and objectivity in the performance of audits that could not be said of an "in-house" job, such was not the reality. Testimony given both by members of the Audit and Review Branch and by representatives of Ernst & Young, the company retained to conduct the audit, confirmed that the external auditors were performing their duties as an extension of the Department and were still very much under the supervision and control of the PWGSC Audit and Review Branch.[19] As Mr. Steinberg stated in testimony before the Commission, "we would project manage an outsourced audit in the very same way that we would project manage an in-house audit."[20]

It was likewise clear from Mr. Steinberg's testimony that the Audit and Review Branch had complete discretion in determining the terms of reference and scope of the audit. This is an important fact to note with regard to bias and the role it played in these events. In his statement of allegations to PIPS and in subsequent interviews with the Audit and Review Branch and the Internal Affairs Department of PWGSC, Mr. Cutler had not suggested or provided any evidence that the irregularities he was observing were intended for personal benefit or gain. Given his position within the organization as a procurement expert, his lack of insight on this point was not surprising. On the contrary, it would have been highly unusual and improbable that anyone contemplating graft or fraud would have explicitly included provisions to this effect in the terms of the contract. Such corruption is, by its very nature, clandestine and privately arranged. Mr. Cutler, a man who was meticulous in ensuring that all of his allegations could be supported, was neither well placed nor qualified to pronounce on whether any of the irregularities he observed might eventually lead down that path. His sole expertise lay with the policies, rules and regulations governing the contracting process. When asked by Internal Affairs at PWGSC whether he had detected any evidence that the irregularities he observed had been intended for personal benefit and gain, he responded truthfully that he had not. It was in this context that the Internal Affairs Department reported this statement to the Audit and Review Branch.

In June 1996, following a second interview with Mr. Cutler, Mr. Steinberg wrote a memo to the ADM, Mr. Stobbe, in which he made the following statement:

> The issue here is one of policy and procedures which may themselves be faulty, however individuals are trying to overcome these by taking shortcuts or inventing methods that have led to willful alteration of documents which, if examined by an audit or outside regulatory agency would raise questions of probity in the manner in which the department is fulfilling its duties and obligations with respect to contracting.[21]

In the same memo, Mr. Steinberg stated that the actions that had been reviewed did not appear to be for personal gain, and instead raised questions of an ethical nature.[11]

This apparent prejudgment of the nature of the irregularities was to have a determining influence on the nature and scope of the audit that was commissioned. Rather than a more expensive and detailed forensic audit, which would have followed a money trail and likely uncovered evidence of any graft, the Audit and Review Branch opted to have Ernst & Young undertake a very modest $34,500 compliance audit of APORS, an exercise that would establish only whether the sector's contracting practices conformed to the policies and regulations of the Department, Treasury Board and the *Financial Administration Act*. In what appears to have been an eleventh-hour attempt to cover all the bases, Mr. Steinberg added to the original terms of reference an obligation for Ernst & Young to indicate in its final report whether it came across any evidence of personal benefit or gain associated with these irregularities. This extension to the scope of the compliance audit was made even though, as Mr. Steinberg later testified at the Sponsorship Inquiry, he was aware that a compliance audit was an inappropriate tool to determine matters of this nature. By using this inappropriate audit tool to address the issue of personal benefit, PWGSC started down a slippery slope to misinterpretation and obfuscation of the facts, in effect almost wilfully ignoring the rattle of the nail coming loose from the shoe.

The first draft of the report that Ernst & Young produced was submitted to the Audit and Review Branch in September 1996, to the attention of Mr. Raoul Solon, the Assistant Director and PWGSC manager in charge of the file. The draft made clear in very explicit and straightforward language that the incidents of non-compliance that had been uncovered in the course of the review of advertising contracts between June 1994 and June 1996 were both extensive and serious:

> Our audit findings reveal non compliance to policies and procedures on a consistent basis. Fortunately, no legal action or public attention has resulted from the deviations thus far. In order to avoid potential embarrassing situations, it is best to address the issues immediately.[73]

The draft included a risk assessment that spelled out four consequences arising from these irregularities that might make the Department particularly vulnerable. These included the possibility that APORS was not complying with Treasury Board and other contracting policies; that contracts could be awarded unfairly and benefit selected contractors; that the tendering process could be perceived as lacking transparency and therefore opening the Government to criticisms; and that the Government might not be receiving full value for money.[74]

In this first draft, Ernst & Young auditors also made clear the limitations that had been placed on them with regard to their ability to carry out the full scope of their work. These limitations were relevant, in particular, to their ability to detect and verify whether the irregularities uncovered in the course of the audit were associated with incidents of personal gain or benefit. Their initial draft read:

> We would like to report that limitations were placed on our audit and as a result, our findings may not address certain issues. Particularly, our audit was directed toward the contracting processes and its compliance with related policies and procedures. Our audit did not address the issue of personal gain as many of the parties remain unknown throughout the process. Furthermore, we were unable to interview the party that brought forward some of the deviations and as a consequence we were unable to determine if other high risk areas should have been audited.[75]

The language and content of the first draft was not to stand. After several conversations and meetings with Mr. Solon of the Audit and Review Branch, the final report submitted by Ernst & Young appears to cast a different interpretation on the findings. Gone was any reference to the limitations on the scope of the audit. Gone was the paragraph identifying the major areas of risk. Gone was the straightforward language with regard to the extent and nature of the irregularities. Instead, the incidents of non-compliance that had been described in the first draft as "serious and consistent" were recast in the body of a more favourable "General Assessment" that downplayed their extent and importance. The final report read:

> The audit of the advertising contracting processes determined that APORS contracting activities generally follow the prescribed contracting policies and procedures but that there are recurring instances of non compliance with specific contracting policies.[26]

The report went on to declare that no evidence of personal gain or benefit had been detected, a finding that could be misleading without the qualification and context provided by the absent paragraph on scope, or by any explanation of the reliability of a modest compliance audit in terms of providing such assurances.

The final summary also differed from the original draft in the absence of any "weighting" of the various areas of non-compliance that had been discovered. As was pointed out in testimony given by the auditors from Ernst & Young, there were certain rules in the competition process that, if not respected, jeopardized the fairness of any action or process that followed thereafter. None of this analysis appears in the summary document forwarded to the senior managers on the Audit and Review Committee. Again, the absence of such essential context significantly veiled the seriousness of the irregularities in a cloud of indiscriminate generalization that did not do justice to the true nature of the findings.

While, at the Sponsorship Inquiry, the memories of all concerned seemed to be vague on what had actually transpired between Mr. Solon and the Ernst & Young auditors over changes to the wording of their findings, it would appear from the testimony that the differences in tone and content between the first submission and the final report were strongly influenced by these discussions. Although there is no question that any final version of that first draft would have included refinements to the language that would have made its presentation more polished and professional, it would seem unlikely that the auditors would have left aside this critical information regarding scope, risk and the consistent nature of the irregularities had there not been some pressure on them to do so. Keeping in mind that this was not an independent external audit—Ernst & Young was in this case acting as an extension of and performing under the authority of the Audit and Review Branch at PWGSC—it is not entirely surprising that its findings were assessed in a collaborative manner and the results framed in language acceptable to both parties.

The final report from the Ernst & Young audit was presented to ADM Jim Stobbe in November 1996. In its conclusion, Ernst & Young stated:

> The initial mandate of APORS was to provide advisory services…to government departments on advertising and public opinion research…. [G]iven procurement is only a small portion of their activity…[individuals are] not specifically trained in …[the procurement] function. They…[do not have the] necessary expertise as it is not their primary goal. It may be more beneficial to all parties to incorporate the procurement of advertising and opinion research within the normal procurement stream of PWGSC.[17]

In assessing these statements by Ernst & Young, the recommendation to return the procurement function of APORS to the mainstream of the Department represents a reasonable and appropriate channel of redress. It would re-establish the original system of checks and balances that had protected that aspect of the function from manipulation prior to the amalgamation under APORS and, by so doing, presumably rectify the irregularities that were occurring under Mr. Guité's authority. But, was APORS actually lacking this expertise? During the two-year period that was the subject of their audit, Mr. Cutler and two other procurement specialists—the same individuals we know had been responsible for procurement when the contracting function was part of the PWGSC mainstream—had been brought into that new unit specifically to continue their responsibility for that function. Nothing in that move had altered their level of expertise in this regard—only their reporting structure, physical location and the independence of their duties from the selection and assessment process. The fact that irregularities had occurred was not due in any sense to a lack of expertise within APORS; it was directly attributable to the fact that the procurement experts were ordered by their superiors to ignore and circumvent the proper rules, regulations and procedures, and were thereby prevented from doing their job.

This "lack of expertise" rationale becomes even more curious in the context of events that were occurring within APORS at that time. It was exactly during this same period in 1996 that Mr. Guité had taken steps to have Mr. Cutler, his chief procurement officer, declared "surplus." While the Audit and Review Branch was constructing its report around the fact that APORS lacked procurement experts, Mr. Cutler was forced to show up for work every day for three months but was given nothing to do. If his predicament was not immediately known to the auditors at Ernst & Young, it almost certainly had not escaped the notice of the senior PWGSC managers directly involved in the development and verification of that final audit report.

Apparently, no one noticed the irony. More important, these auditors and managers let the faulty assumptions of the report's conclusion stand as truth, which at the very least represents an abrogation of the duty of internal audit to provide the Deputy Minister with reliable intelligence. Mr. Stobbe duly accepted the report from Ernst & Young, then followed the established protocol for audits and sent a copy of the findings to Mr. Guité with a request for an "action plan" outlining how he intended to address the irregularities. Evidently, the request held no urgency for either party, since it was not until six months later that Mr. Guité finally informed the auditors that he was in agreement with the recommendation to return procurement to the PWGSC mainstream. With this step accomplished, the Ernst & Young report and action plan were placed on the agenda of the next Audit and Review Committee meeting, scheduled for July, at which time the Committee members accepted both items as written.

Testimony at both the Public Accounts Committee and the Sponsorship Inquiry support the fact that, not surprisingly, the Deputy Minister and his Committee colleagues found nothing particularly alarming or unusual in the Ernst & Young Report. Indeed, there is some evidence that the Deputy Minister, PWGSC, Ranald Quail, never actually read beyond the "General Assessment" included in the summary which, having put the findings in the context of a generally favourable assessment, would have reassured him that the irregularities were of a minor and readily "fixable" nature. Despite the unusual provenance of this particular report, he did not question its conclusions or the rationale that supported them, perhaps a reflection of the level of confidence he held in the integrity of his audit system to present an accurate and reliable assessment of these alleged wrongdoings. To this day he affirms:

> This is a question of the lack of expertise. I read that as a lack of expertise question. I didn't read it specifically as Mr. Guité and that we had to solve the problem of the lack of expertise. If you have solved the problem of the lack of necessary expertise…that we would have met the recommendation….[18]

Thus, the "lack of expertise" myth became a matter of official record. To an outside observer, the resistance or inability of both the PWGSC auditors and the Audit and Review Committee to entertain the notion that the irregularities might have been attributable to wilful wrongdoing, or even managerial incompetence, seems both naive and somewhat unbelievable. Mr. Quail's confidence in Mr. Guité's ability to deal with the issues raised by the audit never appears to have wavered. He testified:

> [T]here was no suggestion that the Action plan, as put forward by him, couldn't be done. He was a senior individual, experienced executive, in my view. That is what his track record was, and I believed that he could do the job.[79]

Such a forgiving attitude was no doubt supported by the auditors' assurance that there was no evidence that these irregularities resulted in personal benefit or gain. The reliability of a low budget compliance audit to provide such an unqualified assurance was apparently never questioned by members of the Audit and Review Committee. Having removed in the final report the "limitations" section of the original draft that would have put this assurance in the proper perspective—indeed, in having included this requirement for assurance in the scope of a compliance audit to begin with—the Audit and Review Branch may have misled the Committee with regard to this important issue. As a result, myth and false assurance took on the veil of truth and became the basis upon which the Committee granted its acceptance of the report and action plan.

As required by policy, the executive summary of the Ernst & Young report and the action plan, along with those of the other five audits considered at the July meeting, were forwarded that fall to Treasury Board for review. Mr. Steinberg testified that he never highlighted the findings of the APORS report as being anything other than routine irregularities. In fact, from his comments it seems obvious that he felt that the onus was on Treasury Board to review the summaries and contact the Department if anything appeared irregular or particularly worrisome. Mr. Steinberg testified:

> The expectation was that the Treasury Board folks would go through the documents, get a feeling for what is there and, if they had a greater interest, would have reported back, would have asked us.... I am just trying to say that all of our audit reports surfaced problems, all of the audit reports that went over to Treasury Board were indicative of problems that surface during an audit covering a range of audits that we had done.... [I]f there were findings that were material or significant that had government-wide implications we would take it upon ourselves to notify the people in Treasury Board.[10]

The submission of the executive summary and action plan was accomplished as a largely *pro forma* exercise. Nothing in the summary report of the APORS file evidently struck the officials there as anything more than routine either, and no follow-up or further inquiry was triggered by this central agency.

1.4

Mr. Guité's Gamble

The principal requirement of the action plan prepared by Mr. Guité—to return the procurement function of APORS to the mainstream of the Department—was never implemented. When the Audit and Review Branch approached APORS six months later to confirm that the appropriate measures had been taken, they were told that nothing had been done. In fact, Mr. Guité is quoted as saying, "Well, I am not very keen on this. I am reluctant to implement this action plan."[11] While admitting that, "I don't think it would have been difficult to execute, to put the action plan in place,"[12] Mr. Steinberg testified he saw nothing particularly unusual in Mr. Guité's response. Asked if this reluctance to comply with the recommendation was not a red flag, he responded, "My answer is no. I would not have [thought it a red flag] six months later after if Mr. Guité was saying, 'I need a little bit more time to get myself organized.'"[13] Deputy Minister Quail, in his testimony before the Public Accounts Committee, offered a more straightforward and telling explanation of why procurement at APORS was never returned to the mainstream:

> That was the way he [PWGSC Minister the Honourable Alfonso Gagliano] wished to have that group [APORS] organized.... [H]e wanted procurement left alone.[14]

1.5

The Creation of CCSB

In November of 1996, almost at the same time as Mr. Stobbe received the final report on the Ernst & Young audit, PWGSC submitted a request to Treasury Board for $34 million in additional funding over a two-year period for sponsorships. The submission was signed by both the Minister of PWGSC, the Honourable Diane Marleau, and Prime Minister Jean Chrétien, an exceptional endorsement that indicated to everyone within the public service the priority that was being placed on this initiative. The money was to support a "Government of Canada initiative to promote all its programs, policies and services by means of sponsorship through selective events across Canada."[15] This submission was considered by most to be the launch of the Sponsorship Program, although selected events had received support prior to this period under the general Government advertising envelope, and despite the fact that the "program" was not officially designated as such until 2002. The departmental contact for this submission was listed as Charles Guité, the Director of APORS.

In November 1997, Mr. Guité was awarded still greater management responsibilities and funding as the head of a newly created entity called the Communication Coordination Services Branch (CCSB). The new Branch took over some of the responsibilities that had been previously handled by the now-privatized Canada Communications Group, incorporated APORS, and was to provide secretariat support to the Cabinet Committee on Communications. Although this was only a scant four months after the Audit and Review Committee had examined the results of the Ernst & Young audit, and notwithstanding the grievance filed against Mr. Guité by his former procurement officer, Mr. Cutler, there appeared to be no reluctance by the Deputy Minister to award this new budget and expanded contracting authority to this same manager. Mr. Quail testified before the Public Accounts Committee:

> [I]t did not occur to me that it [the 1996 Ernst & Young audit] was a relevant document, that we had dealt with it, we had taken action with it, and we had put it to bed and we had moved on....[I]t was a simple as that....[16]

In defence of Mr. Quail's position on this matter, it must be remembered that he had judged the seriousness of the irregularities uncovered by the Ernst & Young audit based on the generally favourable general assessment and assurances that had been offered in the 1996 executive summary. He had no reason to doubt the auditors' conclusions. All of his remarks under questioning indicated that he trusted the findings of this audit and believed the irregularities had been the result of routine administrative problems. He was also aware of the close relationship Mr. Guité enjoyed with the political masters and the Prime Minister's personal interest in this file. Mr. Quail was, it appears, respectful of Mr. Guité as an expert in the field of advertising. He evidently felt there was nothing in the findings of these recent investigations that warranted barring Mr. Guité from assuming this new position and, in fact, based on the experience Mr. Guité already had with advertising and sponsorship, much to recommend him.

1.6

The 2000 Internal Audit

It was not until the HRDC scandal of 2000 triggered a requirement by Treasury Board for all government departments to audit "grants and contributions" programs that Mr. Guité's activities with sponsorships were determined to be similar enough in design to that model to be caught in the net of that horizontal audit initiative.

The internal audit that followed, conducted by the same Audit and Review Branch and under the authority of those who had overseen the 1996 audit, was tasked with examining two aspects of the Sponsorship Program—first, the decision-making process for entering into sponsorship agreements, and second, the contracting process for the agency of record and communications agencies that provided services for sponsored events.[17] The audit began in February 2000 and looked at 276 of 580 existing files that had been chosen on the basis of risk.

The results of that audit revealed that these files contained deficiencies that were very similar in nature to those detected four years earlier by Ernst & Young: lack of documentation; non-compliance with Treasury Board rules and directives; lack of transparency in decision-making; and questionable value for money.[18] This time, however, Mr. Steinberg admitted in testimony before the Public Accounts Committee that these findings were both "significant and unacceptable."[19]

As with the 1996 audit, it was a preliminary draft of the 2000 audit report that was most forthright and candid in articulating the irregularities uncovered. More important, it referenced its findings against the action plan of the 1996 Ernst & Young audit and concluded that, "no evidence was found to conclude CCSB management fully implemented the recommendations of the 1996-97 audit." The draft report made it clear that, in the opinion of the auditors, this oversight was a significant factor in the perpetuation of the contracting irregularities that had been uncovered, and recommended that a follow-up audit to ensure compliance be performed one year following the acceptance of the 2000 report.

Remarkably, the final report of the 2000 audit that was submitted to the Audit and Review Committee in August of that year contained no reference whatsoever to the findings of the 1996 Ernst & Young report, or the relationship between the 1996 findings and the irregularities uncovered in 2000. No mention was made of the fact that the action plan was never implemented. Testimony at the Sponsorship Inquiry confirmed that senior managers at the Audit and Review Branch had taken a conscious decision to remove any reference to the earlier Ernst & Young report. That decision was based on the fact that no audit had actually been conducted that could substantiate the statement that the action plan had not been implemented. Thus, the failure of managers to follow up on irregularities uncovered in one audit was used as the basis to exclude these earlier findings from the report of a second audit. It was a quintessential moment of bureaucratic "ass-covering" worthy of its own episode of "Yes Minister," but in terms of the true purpose of internal audit, it was also an abdication of integrity. Consequently, the Minister of PWGSC, the Honourable Alfonso Gagliano, when briefed on these year 2000 audit results, had no way of knowing that a similar review had been conducted four years earlier revealing equally serious breaches of compliance, or that the measures to address these deficiencies had not been pursued.

Consistent with the tone and language used in the 1996 report, the irregularities found in 2000 were again profiled by the auditors as "administrative" in nature. In fact, Denis Desautels, the former Auditor General of Canada and an expert in the field of auditing, found that:

> [T]he conclusions they came to could be said about virtually any audit: "did not fully comply with the spirit…process is subjective…does not ensure that decisions are transparent…." What they say is not very helpful; they used very soft language that doesn't reflect the real abnormality of the situation.[40]

It appears obvious that, despite the extent of the irregularities discovered, the intention of the 2000 report was to downplay their seriousness and convey the impression that the wrongdoing was more in the realm of clerical error than gross mismanagement. As with the previous audit, the report was submitted to the Audit and Review Committee with a 27-point action plan designed to quickly remedy these "administrative" ills.

There is some question as to whether assurances that there was no personal gain or benefit associated with these irregularities were again proffered by the auditors on this occasion. According to the Minister, Mr. Gagliano, they were. His recollection of this assurance from Mr. Steinberg is as follows:

> I took a few steps into my own office and I came back, and my first question was: "Should I call the police?" And the answer was: "No. There has been no criminal activity. It's just bad management of the files, etc." And there, they proposed to us an action plan and we discussed the action plan.[41]

Mr. Steinberg, however, has a different recollection of events. In his testimony before the Public Accounts Committee, he stated that he was:

> deeply concerned that there were perceptions that these findings had been characterized as administrative in nature: I consider these lapses to be significant and unacceptable. I never used the word "administrative," nor would I, as these were significant material lapses.[42]

Whatever the truth, a heightened sensitivity to these matters had gripped official Ottawa as a result of the fallout of the HRDC scandal, and the sponsorship scandal was beginning to attract some attention from the media. Daniel Leblanc of the *Globe and Mail* had filed an access to information request with the Department asking for all records relating to sponsorships in the 1994-1995 period. Senior managers at PWGSC were aware that this was the period that had been covered by the 1996 audit and that the summary of that audit report, though substantially muting the real level of irregularity uncovered, would be readily available through access to information, as would the 2000 report. If any evidence of a link between the two had been purged from the official transcript of that latter report, it was unlikely that an inquisitive investigative reporter would not eventually connect the dots and follow the trail of ongoing irregularity in this politically sensitive program.

Finally, the Official Opposition and members of the Government's own caucus were beginning to ask their own questions about sponsorships. Although originally profiled as a means to promote government programs throughout Canada, it was becoming increasingly obvious to Liberal MPs that most of this well-endowed fund was being devoted to Quebec events, and pressure was being put on both the Minister and officials to spread the largesse beyond Quebec.

With the heightened sensitivities at play at the time, the results of this audit could not be flown under the radar of Treasury Board or the Auditor General, who undertook her own investigation into three advertising contracts awarded to the advertising company Groupaction. Even with the irregularities explained in the most benign of terms, the temper of the times conspired to make the findings of this audit a bit of a *cause célèbre*. The nail had finally worked itself loose from the shoe.

1.7

The Post-2000 Audit Period

The Audit and Review Branch of PWGSC did carry out a follow-up compliance audit on CCSB as prescribed in the action plan, albeit six months later than intended. The delay was imposed to accommodate the fact that many of the measures in the action plan could not be implemented until the beginning of the new fiscal year the following April. CCSB had by then been disbanded and its responsibilities transferred to a newly created entity within PWGSC called Communications Canada. Mr. Guité had also retired in late 1999. His replacement was Pierre Tremblay, former Chief of Staff to the Honourable Alfonso Gagliano. When the follow-up audit was completed in 2002, the results revealed a much-improved profile in the administrative management of sponsorships. In the sample of 120 files taken from the total of 323, all, with very few exceptions, were found to be properly documented. Again, this audit examined only whether all the required documentation was present in the files. It did not "follow the money."

In May 2002, the Auditor General presented her Special Report to Parliament in which she outlined the findings of her audit into the three sponsorship contracts awarded to Groupaction. The public announcement of her findings, a damning indictment of the management of these sponsorships, and a referral of these files to the RCMP, triggered a maelstrom of Opposition and media attention.

In an effort to manage the information and ensure that the Minister was prepared to respond appropriately to an outraged Opposition in Question Period, as well as to satisfy the barrage of access to information requests raining down on the Department, a Quick Response Team was assembled from among departmental employees. Their mandate was to review 126 of the 721 sponsorship files for the 1997-1998 period, while a separate group from Consulting and Audit Canada, a government agency specializing in all aspects of financial administration and audit, was commissioned to review all 721 files for their completeness and assess them for areas of concern. It was the outcome of these latter investigations, no doubt coupled with the Auditor General's scathing report, that finally convinced senior managers at PWGSC that the time had come to call in the forensic auditors.

The forensic investigation revealed many of the same irregularities uncovered in 1996 and 2000, but in this instance the potential for fraud and corruption in these irregularities could not be ignored. The forensic audit findings mirrored many of the concerns raised by the Auditor General in her 2003 Report, including breaches of the *Financial Administration* Act, Treasury Board and departmental policies, over-billing, lack of competition for contracts, suspicious variations in hourly rates, deficiencies in record management and numerous practices that brought into question the value for money the Government had received from these sponsorship events. The Sponsorship Program quickly spiralled into a political nightmare, a shoeless horse galloping wildly into the night, its rider perilously grasping control of the reins in an effort not to become unseated, until mud was flinging in all directions as the baying of the wolves at heel grew louder.

2 How to Explain "Such Lack of Care"

Even to the lay observer, it is obvious that the role of internal audit as a reliable tool of oversight of performance and financial management in government failed the senior management at PWGSC on several important counts throughout the sorry history of the sponsorship scandal. The salient question is "Why?" Why would an audit branch seek to subvert the message of its own findings in its reporting to senior management? What cultural, institutional or structural factors might be at play that would encourage auditors to purposefully avoid investigations of activities that posed a significant risk to the Department?

Was it incompetence, poor judgment, a lack of appropriate systems and oversight, or were there other environmental and cultural factors that might have conspired to frustrate the integrity of the audit process?

2.1

Competence and Judgment

As Arthur Kroeger once remarked, "Judgment is like electricity—hard to describe but very evident when it fails." It is highly conceivable that at critical points in the audit history of the Sponsorship Program, those responsible for pivotal decisions on when and when not to audit, simply got it wrong. The Audit and Review Branch at PWGSC was shown the first red flag in 1995 when Deputy Director Julie Ginley uncovered problems with regard to the transparency of the advertising contracts, and excessive pricing. An audit was recommended. There was judgment exercised by the audit team in choosing not to pursue that recommendation. A similar decision to eliminate APORS from the audit roster was taken again the next year.

Likewise, when APORS could no longer be ignored following Mr. Cutler's allegations, the auditors may simply have believed Mr. Guité's version of events and dismissed the procurement officer as a malcontent. The Ernst & Young audit may have been undertaken as a *pro forma* exercise designed only to satisfy the Department's obligation to follow up, without any real expectation of uncovering serious wrongdoing. Mr. Steinberg's letter to Mr. Stobbe, cited above, certainly seems to support this theory, but equally it calls into question the competence and judgment of the auditor in assessing the scenario surrounding the allegations and choosing the appropriate audit tool. The answers you get depend on the question you ask, and in this sense, the head of audit exercises great discretion when defining the type and scope of investigations.

2.2

The Politicization of Internal Audit

According to Professor Denis Saint-Martin, the lack of willingness of the members of the Audit and Review Branch to seriously question the activities of APORS might well be explained by what he calls the "structural politicization" of the public service.[13] According to Professor Saint-Martin's thesis, the federal bureaucracy does not remain neutral in the face of threats to the integrity of the country such as that posed by the near-victory of the separatists in the Quebec Referendum of 1995. He states:

> [I]t is not an exaggeration to say that, as a value, the promotion and the defence of national unity constitutes an important part of what one might call the "institutional genetic code" of the Canadian public service.[14]

If Professor Saint-Martin's theory is valid, this "institutional genetic code" among public servants to protect national unity at all costs would have been at its most heightened state in the politically-charged atmosphere of the post-Referendum period. Mr. Guité's declaration that, "the rules did not apply" to him or his Department takes on a new complexion when viewed in the context of this "greater political cause." Although his words, taken out of that context, appear to be an arrogant and unacceptable flouting of all standards of responsible public administration, that statement, in the context of the times, in his own mind and in the mind of his political masters, was fully justified by the need to defeat the separatists at any cost. If rules were broken along the way to accomplishing that higher objective, it was perceived as collateral damage and inconsequential in terms of the larger threat to the Canadian state. As Professor Saint-Martin points out, since the fallout of the sponsorship scandal, Mr. Guité has "played the patriotic card fully" as a rationale for his behaviour and continually justified his contravention of the contracting rules because the federal government was "at war with the separatists."[17] Even Prime Minister Chrétien seemed to echo Mr. Guité's justification when he dismissed the gravity of the money lost to sponsorship as minimal compared with the cost of losing the country. In an interview with *Globe and Mail* reporter Daniel Leblanc, Mr. Chrétien is quoted as saying:

> Maybe a few million got lost along the way, but how many millions and millions were saved because we were able to reestablish the stability of Canada and protect the unity of the country?"[18]

Could this "institutional politicization" explain the reluctance of the Audit and Review Branch to fully delve into or disclose the irregularities occurring within Mr. Guité's domain? Were its decisions influenced by a political bias that rationalized the need to cut corners if the country was to be saved? Certainly, Mr. Guité's assertion that the rules of everyday contracting were not workable in the context of a national crisis and therefore did not apply to him seemed to have gained some resonance with the head of auditing, Mr. Steinberg. Evidence of this is suggested in the wording of Mr. Steinberg's early memo to ADM Jim Stobbe when he refers to "rules that themselves might be faulty" in his explanation of the irregularities that had been discovered at APORS. A philosophical alliance of public servants with Mr. Guité's cause might also explain the auditors' seemingly premature conclusion that the errors were entirely administrative and therefore not intended for corrupt purposes. In the context of Mr. Guité being seen by his colleagues as a patriotic foot soldier fighting in the battle to save Canada, it would have seemed petty and inappropriate for the auditors to have questioned his motives or to have pursued a forensic audit when the very future of the country hung in the balance.

Although other cultural factors characteristic of the public service may also have been at play, the concept of bureaucratic politicization also helps to explain why the Audit and Review Branch and senior managers apparently had so little sympathy for the fate of the "whistleblower," Mr. Cutler. Viewed through the prism of Professor Saint-Martin's theory, Mr. Cutler might have been perceived by the bureaucracy as more of a "traitor" to the cause of national unity than an ethical and courageous public servant. His obsession with the regularity of rules and procedures would be seen as irrelevant and inappropriate in light of the political circumstances. Mr. Guité's condemnation of Mr. Cutler as "not a team player," and his apparently unopposed declaration of Mr. Cutler as "surplus" to the Department, seems to support the idea that Mr. Cutler was held in contempt by both his colleagues and the management at PWGSC, and that he was viewed as someone unable to "get with the program" in the face of a national emergency.

2.3

The Impact of Political Interference

On the other hand, it is entirely possible that the answer to why auditors ignored or deferred to Mr. Guité had nothing to do with patriotic fervour. There is a very high probability that the reluctance of PWGSC auditors to poke the sleeping giant within their midst was simply a classic manifestation of the bureaucratic instinct to defer to political power and stay out of the path of political masters. The covert, off-the-grid nature of Mr. Guité's shop, the unusual and high-level political reporting relationship he enjoyed and touted, the man's apparent power to act with impunity, and his flouting of the rules sanctioned, if not orchestrated, by the executive level, were all message enough to the average gun-shy public servant that this was one area best avoided. This tendency of bureaucrats to deference, complicity and in some cases, sycophancy when dealing with the political level, could easily explain why the auditors repeatedly looked the other way, watered down the language of reports, ignored Mr. Guité's failure to implement his action plan, and generally avoided, to the greatest degree possible, any contact with the small group known as APORS.

They could not be faulted for this avoidance. The decision to determine who to audit is discretionary. There are always enough sectors with a noticeable level of "risk" in any given year without the auditors purposely seeking to ruffle the feathers of the political deities by harassing their chosen one with unseemly probes. In the early years, their avoidance may well have been instinctive. After 1996, with Mr. Cutler's hide proverbially nailed to the barn door, there was ample evidence that their instincts not to meddle had been right. "They were wary of him [Mr. Guité],"[illegible] said one former Deputy Minister. Even those in senior management were warned off the chase. When, following Mr. Cutler's allegations, ADM Jim Stobbe appeared to take too strong an interest in what was occurring in APORS, the pushback from the Langevin Block came in the form of a call from the Deputy Clerk of the Privy Council, Mr. Ron Bilodeau, to Deputy Minister Ranald Quail, in effect warning him to call off Mr. Stobbe's questioning of the Sponsorship Program.[19] Whether the message was implicit or explicit, the Department understood that it was not to meddle with Mr. Guité. The decisions of the Audit and Review Branch could well have been simply a reflection of that understanding.

This perspective would also explain the auditors' reluctance to embrace the revelations of Mr. Cutler. On one level, the bureaucracy's dislike of whistleblowers is nothing new. While it might seem counter-intuitive that those public servants who demonstrate the highest standards of professional ethics by coming forward to expose government wrongdoing or corruption would be vilified by their colleagues in the public service, it is in fact more often than not the case. As Brian MacAdam, a former career foreign-service officer and expert witness before the Public Accounts Committee, stated in testimony:

> The typical attitude of bureaucracies to bad news is that we shoot the messenger: if it happened in my ministry or division, then it's a negative reflection on me, and no news is good news.[20]

There is also, no doubt, some natural defensiveness on the part of the Audit and Review Branch in the light of revelations by a public servant. By the very act of disclosure, whistleblowers reveal that internal audit has failed in its job. It presents a reversal of traditional roles that is entirely unwelcome, where the negative consequences of "getting caught out" are suffered by the auditors rather than the other way round. Once such disclosures are revealed, an audit branch must retrace its tracks, support management efforts to contain and control the damage, and work with those responsible to correct the situation. This represents a crisis for an audit branch, an extraordinary and highly sensitive task that must be managed with the available resources or for which extra funds or resources must be found. In the case of the Cutler allegations, it also meant that the Audit and Review Branch could no longer turn a blind eye to APORS. It was forced to poke the sleeping giant. It was no surprise then that it chose the smallest and least intrusive stick with which to pursue that probe. In fact, it ensured that someone else altogether wielded the stick, and then took on the role of shield when the barbs probed too near to the truth. In so doing, the Audit and Review Branch became the giant's ally and was perhaps thereby delivered from his wrath. It would also explain why the auditors did nothing to protect Mr. Cutler from Mr. Guité's ruthlessness thereafter.

2.4

The Influence of Audit Culture

To assume that all internal auditors perform their function completely without bias or, in some instances, their own agenda, would be false. While many auditors undertake their duties in a professional and objective manner, it has become apparent from discussions with senior managers[30] that the culture of internal audit has in some ways and to varying degrees itself become a significant impediment to its appropriate functioning. It is the impression of managers that the auditors no longer approach their duties in the objective, clinical fashion that the pure theory of internal audit suggests, but rather bring to the table a set of attitudes, philosophies and objectives that may serve to taint and frustrate the process. Chief among these is what has been described as the "gotcha" mentality, whereby the subtext of many audits becomes the imperative to come up with "something"—anything that will reflect poorly on management. This less-than-open-minded approach often leads to what is known as "mandate creep"—the tendency of auditors to go beyond the scope and methodology prescribed in the terms of reference of an audit and examine other aspects that they find more enticing, or to which they have more of a philosophical and/or educational predisposition. It is felt that the "look what's over there" mentality is a manifestation of auditors' desires to never come up empty-handed. The amount of time that is required by managers to negotiate the text that results from this "mandate creep" is, according to one manager, "incredible."[51]

The audit methodologies chosen by auditors can also be at odds with changing approaches to management. Programs may be assessed against standards that are no longer relevant to or accommodating of legitimate changes in management practice. One former ADM described this type of situation as follows:

> The Internal Audit Bureau did not review its task of auditing grants and contributions as new and thereby requiring tailor-made methodology. Auditors simply viewed the audit as an extension of the way they did similar audits in the past. While the programs might have been changing, the audit standards were not....[52]

Whether this intransigence on the part of auditors is intentional, or merely the result of a lack of synchronization between the evolutions of methodology in audit practice with that of management technique, is irrelevant. The result is an inevitable clash of cultures, a buildup of frustration and resentment on both sides of the exercise that galvanizes antagonism and corrodes the effectiveness and efficiency of audit as a support function of management.

There is another cultural aspect of audit that was repeatedly cited by managers. That is a phenomenon known as audit arrogance, an attitude encouraged by the auditors' belief that they are "untouchable" in terms of management reach or control and are therefore an omnipotent force unto themselves. This arrogance is also manifest in what has been sometimes referred to as "audit rhetoric,"[53] the penchant of auditors to pontificate on the potential implications of their findings rather than limit their reports to a clinical assessment. The "just the facts, ma'am" expectation of management is therefore at odds with an auditor's predilection to accompany findings with more colourful commentary, statements that can cast a particular spin or interpretation on the findings that may or may not be justified by the facts but that, in any case, exceed the audit mandate. More appropriate to the audit would be what David Good refers to as "audit humility,"[54] a conservative approach to reporting that removes the journalism and punditry from audit reporting and confines results to a strict clinical analysis of the program under review.[55]

There are institutional factors that affect the culture of audit and that can influence the relationship and affect the comportment of both audit team members and the managers they serve. In a hierarchical system such as the public service where salary, status and employment privileges, the size of one's office, allowable furnishings, parking, or even the provision of windows, are based on levels and classifications within a tightly controlled pecking order, there is a fundamental disconnect between the authority, autonomy and power of the auditors and their actual ranking within the bureaucratic system. While the heads of audit branches are generally classified in the executive category and a handful of the more credentialed members are classified in the financial officer or "FI" category, the majority of internal audit foot soldiers fall into the "AS" group, a designation indicating that their duties are of an administrative or clerical nature and are, in essence, a support function. The natural human tendency for those of an inferior status to try and bring down a peg or two, or at the very least rattle, the titans above them cannot be discounted. Nor can the contempt of managers forced to negotiate serious matters with inquisitors far beneath them in the institutional ranking.

Seen through this paradigm, internal audit might be viewed in terms of a subtle class war, where the lower status auditors have, fantastically, been awarded magical powers with which to antagonize and frustrate the ambitions of their betters, and the mandarins in response seek to contain and limit the extent of those powers. This status-induced "we-they" attitude plays out at different levels, depending on the culture of each individual department and perhaps explains why some Deputy Ministers give little "face time" to heads of audit and insist that they report at a more appropriate level, while others make all the time necessary for them. It might also shed light on the origins of the cat-and-mouse relationship that sometimes develops between auditors and those they audit and the fervour with which some investigators pursue their "gotcha" style of auditing.

The relatively low professional status of departmental auditors can also have some influence on the type of personality, level of training and competence of the incumbents. Unlike the private sector, where a significant period in internal audit is a compulsory milestone for those on their way to the top, the public service demands no such experience of its future leaders. As a result, internal audit is bypassed by the best and brightest on their route to the upper levels, with the result that many senior managers may arrive there with little understanding of the audit function and, therefore, its utility. Likewise, while many pursue this occupation by choice, internal audit departments are also renowned as a holding tank for bureaucratic drones, a reservoir where those without the capacity for higher duties are relegated and left to fester along with their professional resentments.

All these factors come home to roost in what has increasingly become an "audit society." I am told managers would readily accept the outcome of appraisals if they were undertaken by competent, objective audit professionals who were clinical in their approach and who designed audits solely with the intention of identifying gaps in program performance or financial regularity. However, the combination of philosophical bias, questionable methodologies, mandate creep, the "gotcha" mentality and, sometimes, the sheer incompetence exhibited by auditors, results in valuable hours being wasted at all levels negotiating the language and veracity of reports. This dynamic can lead to the development of antagonistic rather than collegial relationships and, occasionally, personal animosities between auditors and managers. When this dynamic develops, as it apparently often does, audit becomes a weapon of internal politics, a contest between the "checkers and the doers" that brings significant inefficiencies into the machinery of government and poisons the atmosphere of departments and the morale of public servants.

On the face of it, this analysis of audit culture would seem in effect to lay waste to the theory that the auditors at PWGSC would have been anything less than vigilant in their pursuit of Mr. Guité. It suggests that the information disclosed to Ms. Ginley in 1994 would have been like blood to the hounds and should have set the auditors eagerly on the trail with the single-minded intent to ferret out the wrongdoing. The fact that this did not happen must also be considered instructive. Why did the auditors not pick up the scent? Was it sympathy for the federalist cause, political interference, missed cues?

There is one other explanation, however facile, that must be considered. The auditors may have simply very much liked, and therefore believed, Mr. Guité. By all accounts, he can be a charming and persuasive man, even possibly an example of the type of manager that Professor Hare at the University of British Columbia calls a "corporate psychopath."

According to the professor, these individuals are "ruthless, manipulative, superficially charming and impulsive—the very traits that are landing them in high-powered managerial roles."[56] Even after all evidence had been exposed that alleged serious wrongdoing and possible corruption on his part, Mr. Guité sounded almost believable when professing his innocence at the various inquiries he attended. Could it be that the auditors, like so many others at all levels of government, were simply taken in by his charm and conviction?

2.5

"Who Let the Dogs Out?" The Impact of Access to Information on Internal Audit

The central tenet of an internal audit is exactly that: It is "internal." These "snapshots" in time are meant to function, however adequately or inadequately, as a confidential tool of management for the use and instruction of those responsible. Over the past 20 years, however, this fundamental principle of internal audit has been overtaken by the desire for government to operate with greater openness and transparency. One manifestation of that philosophy was the 1983 *Access to Information Act* (ATIA), which offers anyone the opportunity to request copies of all government documents with the exception of those that contravene principles of Cabinet secrecy or personal privacy.

The "internal" aspect of internal audit has been caught up with this philosophical drive to openness to the extent that all working documents and reports produced are now available under ATIA. In the late 1990s, Treasury Board became even more proactive on this score and required that all departments post the summaries of their internal audit reports on departmental web sites or send them to Treasury Board for posting.

While such efforts towards transparency in government are laudable, the impact of such openness on "internal" audit has been significant, and the outcome for both departments and the public has not always been entirely positive. There are several reasons for this, among them the technical nature of audits and, not surprisingly, the sensitivity of the information contained in these reports.

There is also the fact of what has been called the "expectations gap"[57] between what the public expects from an audit—the detection of fraud—and what audits actually deliver—an opinion on financial statements that appeals to the notion that the statements are "true and fair."[58] This gap is widened by the use of the term "audit" to include, in addition to financial audits, such exercises as performance audits, "value for money" audits, management audits, "systems under development" audits, compliance audits and environmental audits. As David Good points out, the vast majority of these have very little to do with public money,[59] but the distinction between them and financial audits are rarely recognized in the public forum.

The perception of audits as always dealing with matters of finance owes its origins to, and is reinforced by, the high profile of the annual Report to Parliament made by the Auditor General. Again, the distinction between the objectives of these external audits and those of an internal audit are not well-appreciated or understood. As David Good explains:

> The client for the internal audit is the department, including the managers and its deputy minister. The client for the external audit is Parliament and by extension the taxpayer. The head of the Internal Audit Bureau reports functionally to the Deputy Minister. The external auditor—the Auditor General—is an agent of Parliament and more specifically, of the Public Accounts Committee. He or she does not report to the Government. Internal audits are provided to departmental managers and are normally made available publicly in a low-key manner on request or placed on the department's web site. External audits are tabled quarterly in the House of Commons through the Speaker of the House in a high-profile

> manner…complete with an advance "lock-up" of the media. The Auditor General gives interviews to the media and his or her external audit is widely reported….The internal audit sometimes undertakes "systems under development audits," which provide immediate and ongoing results to managers so that programs can be changed and adjusted as they are implemented. The external audit normally produces final audits that identify areas for improvement after the program has been implemented.[60]

There is, as demonstrated by the above explanation, a qualitative difference in the intent of the two processes. Internal audit is meant to provide managers with periodic snapshots of the day-to-day workings of the department. The external audit provides a final report card on how the department is functioning for the benefit of Parliament and the Canadian public. One is meant as a management tool, the other as a tool of parliamentary and public accountability. The difference, however, is technical and not readily grasped by the average citizen.

It would not be surprising to discover that, given the high and very public profile of the Auditor General's Report, departments, and especially Deputy Ministers, have a strong vested interest in ensuring that the Auditor General's findings are cast in the best possible light. To that end, lengthy, difficult, and detailed negotiations over facts and interpretations take place, often at the highest levels.[61] As former Auditor General Denis Desautels can attest, great pressure is regularly brought to bear on the auditors to modify and tone down the language of their reports when adverse findings come to light. The reason for such a tough stand is obvious: No department wants the Auditor General's report to be the cause of embarrassment to either their Minister or the Government. Mismanagement writ large across the national headlines is the nightmare of every Deputy Minister. Both their personal reputations and those of their political masters depend on a generally favourable assessment of the department's financial management. And so the negotiations are forceful and substantial, with their outcome representing very high stakes for the departments involved.

Having said this, it must be noted that the ability of departments to influence the Auditor General's language, however forcefully it is applied, remains in the realm of persuasion. As an independent officer of Parliament, the Auditor General is under no obligation to negotiate the language of her Report with anyone. Deputy Ministers have no authority to demand or impose changes in the wording of an Auditor General's report. The sole impetus for the Auditor General's office to engage in such dialogue is to ensure that the Auditor General has, in fact, got it right, that the findings reflect a true and accurate state of affairs. It is a courtesy as well as a check against possible errors and oversights in the Auditor General's own auditing process. It is, however, a convention, not an obligation.

Prior to the enactment of the *Access to Information Act (ATIA)*, reports of internal audit were never made public. As internal and confidential documents, these findings were the business of no one other than the Deputy Minister and other senior and department managers. Negotiations between auditors and managers over language, scope and outcome were of importance only in the sense of ensuring their utility in addressing appropriate risk elements and detecting gaps and irregularities. Oversight of the internal audit process by central agencies, specifically the Comptroller General's Office or Treasury Board, has varied greatly over time, but even this measure of outside scrutiny remained under the Government's lid—a confidential matter between the department and the central agency.

When the ATIA opened the door to public disclosure of these internal reports, everything changed. The Government failed to anticipate the inability of the public to understand and distinguish between the various types of internal and external audits or how the media and opposition might exploit this misunderstanding for their own professional or partisan purposes. At the same time, it should come as a revelation to no one, given human and bureaucratic nature, that the consequence of compelling departments to hang out their dirty laundry in public is more often than not a whitewash of the linens. Negotiations between managers and auditors on language and findings have been taken to a new level, with the added pressure of public disclosure of the results. Indeed, as evidence from the sponsorship audit indicates, this has had a self-censoring effect on the auditors themselves. The raw objective of internal audit as a candid tool of oversight has been placed at cross-purposes with the larger obligation of departments to protect themselves and their Minister from public criticism. In that contest, the management function is inevitably sacrificed. The result is now a tendency towards increased obfuscation in internal audit reports, if not the outright removal of any damning information. Reports are written in vague and unspecific terms that do little to distinguish real and substantial irregularity from the garden-variety type, and are therefore of questionable utility to the senior managers or to audit and review committees, the ultimate recipients.

It might also be argued that the unspoken obligation for departments to marshal the wording of their internal audits (at every stage of their development, given the complete access to all working documents allowed by ATIA) to prevent any self-inflicted wounds on the Minister or the department represents an inappropriate politicization of the function. It imposes on managers and auditors a role more appropriately performed by ministerial political staff, whose primary purpose is to assess and contain the political fallout of departmental statements and activity. The impact of ATIA on the integrity of the internal audit function is an issue that has to date remained completely below the radar of academic analysis. However, given the role it has played in the two largest political dust-ups of the 21st Century in Canada, it is one that is perhaps worthy of future attention.

2.6

Exerting Control on Contract Auditors: A Case Study

For government departments to "hide" politically significant or damaging internal audit findings in the language of their summaries and reports is relatively easy, given that the writing of these documents is entirely within the control of the department. This process of "containment," whether it be inspired by normal auditor-management gamesmanship or by the perceived need to protect the department and Minister, is somewhat more delicate to manage when outside consulting firms or auditors are engaged to undertake internal audits.

One recent example involving a workplace safety audit for the National Capital Commission (NCC) provides an interesting insight into this phenomena:

> The $12,000 contract was handed to Safety Projects International Inc., of Kanata, and it involved about two weeks work of first-hand inspections.... He [consultant Bill Pomfret] produced a 32 page report, remarkable for its blunt language and embarrassing revelations. But the most shocking part was yet to come. The NCC immediately fired the "alarmist" report back at him, ordering him to soften the language and cleanse the report of personal opinion....”[63]

The specialist, Bill Pomfret, acquiesced to his client's request and rewrote the report to try and accommodate the NCC's concerns. Still, on October 1, 2004, the NCC's health and safety advisor, Stéphane Trudeau, wrote Mr. Pomfret a memo expressing continued concerns about the tone of the report:

> After reviewing the document, although we appreciate your effort to soften some of the wording, we remain dissatisfied with the report.

> There is definitely a lack of contextualization which makes this report more alarmist than it should be."[81]

Mr. Trudeau then proceeded to give the consultant some direct advice, including "stick with the facts; hence we request that you remove all personal comments that are unnecessarily offending. . . ."[82] Examples of the report's "offending" commentary included statements such as, "The results of this very basic risk assessment demonstrate many aspects of the Commission's activities which have simply been mismanaged for decades."[83]

Obviously, this rhetoric was not what the manager responsible welcomed nor what the NCC wished to see floated in the public domain. While efforts to tone down the report might be ethically questionable in a closed-loop environment, such defensive action becomes far more acceptable and legitimized when the larger interests of the organization are at stake. What is interesting from a public administration perspective vis-à-vis internal audit is that the priority of pre-emptive damage control becomes a mechanism to legitimize all obfuscation. The ethics of fiddling with objective analysis become less rigid. The danger in this instance, as with any other report that has been subject to emasculation, is that this modified picture becomes the official version of the truth, and all weighing of the seriousness of infractions is obliterated. The senior managers and members of the audit and review committee who are the ultimate recipients of these reports, but who are not involved in the negotiation process, take from them the same message as anyone else — that, with the exception of a few minor irregularities, all is working well.

2.7

Internal Audit: Lessons of the 2000 HRDC Scandal

If the HRDC “scandal” is any evidence, there is good reason for public servants to fear the potential rebound of the posting of internal audit reports. In an effort to pre-empt an expected barrage of access to information requests on the results of a compliance audit of a particularly complicated and politically sensitive “grants and contributions” program known as TAGS, senior managers in HRDC decided to hold a press conference to release the findings. This decision was consistent with the Government’s emphasis on openness and transparency, but also reflected the political nature of the issue under investigation. Questions had been raised in the House of Commons, and the media had caught scent of a potential headline. The thought was that in being proactive with the release, HRDC would pre-empt any suspicions that the Department had anything to hide from what was, in essence, a review of documentation compliance.

As David Good’s book, *The Politics of Public Management*, describes, the result was catastrophic. The penchant for the public and media to construe every audit as being an accounting of financial integrity resulted in the immediate interpretation of the results of this administrative review as gross financial mismanagement. Deficiencies in documentation revealed by the compliance audit were said to constitute a “billion dollar boondoggle,” and the issue quickly spiralled into a full-blown political scandal for the Minister, the Honourable Jane Stewart, and her Department. As the author recalls:

> “One billion dollars lost.” The expression, however distorted, was dramatic and the image vivid. A seemingly dull administrative audit was “recontextualized” into a newsworthy sound-bite and a catchy headline. In fact, no money was lost.”

For the ten months that followed, HRDC and the Liberals were pilloried by the Opposition, the media and the public. A report by the Auditor General finally quelled the attacks with some rather unremarkable findings that indicated a scant $85,000 of the $1 billion "lost" was unaccounted for, but by then that information was all but irrelevant, since the impression of gross financial mismanagement had been firmly planted in the minds of the public. This tempest in a teapot, largely fuelled by the huge gaps in public understanding of the multi-faceted nature of audits, was irrefutable proof of the political damage that could be wrought by the "expectations gap" and the exploitation of it by the media and Opposition:

> To most people, an audit is an audit is an audit. It is thought to deal directly with money. In the world of audit, there is a large array of different types of audits, most of which do not deal directly with money.... Given the complexity of these audits, it does not seem possible to distinguish between them in a manner that is understandable, even for those inside government let alone those on the outside.[67]

For HRDC, the affair quickly spiralled into a "When did you stop beating your wife?" scenario that no communications plan in the world could quell. Attempts by the Minister, the Honourable Jane Stewart, and Prime Minister Chrétien to explain the matter for what it really was went unheeded, as did departmental efforts to correct perceptions. As the former ADM explains:

> The media dismissed explanations and briefings by departmental officials as too complicated, confusing, and simply designed to support the Prime Minister. The Ottawa Citizen reported on a technical media briefing by two senior HRDC officials, claiming that they were dispatched by the Prime Minister's Office to clear up some of the "factual misunderstandings" and to back up Mr. Chrétien's interpretation of it.[68]

In his analysis of the affair, Mr. Good is particularly critical of the media, who he accuses of having a "preformed story line" into which they try to shoehorn the facts, with little regard for accuracy or truth. While some of their misinterpretations might be attributable to the same fundamental misunderstanding of audits exhibited by the general public, Mr. Good's impression is that their incendiary rhetoric is fuelled by less innocent motives.

Interestingly, in his "lessons learned" section, Mr. Good advises senior mangers to "know what underlies internal audits and challenge both their findings and their conclusions."[69] This approach is suggested as a way of ensuring that audit reports never appear in the public domain with any information that might be misconstrued or "recontextualized" in a way that would prove detrimental to the department or the Government. It seems to encourage, out of necessity, the crafting of audit reports that hold as their chief priority the protection of the department against public scrutiny. Implicit in its direction is the need to sanitize or eliminate any information or findings in the report which might reflect negatively on programs or operations. It does not, however, support the original and more legitimate task of internal audit to provide thorough and candid information to senior managers on the true state of their administration, financial or otherwise, and as such is emblematic of the degree of impact that public disclosure has had on this management function.

Ironically, the result of public access to internal audits has been to diminish their reliability and usefulness to managers without really offering the public an accurate window on government either. It is, as Denis Desautels points out, legitimate for Deputy Ministers to want to know first when there are problems within their department,[70] and legitimate that they be given an opportunity to address them in the regular course of departmental management without a great deal of public scrutiny and external fanfare. In a very real sense, ATIA has turned every internal audit into an external accounting. The result is a bastardization of the role, with potentially dangerous consequences for both the Government and the public.

2.8

What Have We Learned?

What have we learned from this exploration of the dynamics of internal audit in general and its role within the management of advertising and sponsorships at PWGSC in particular?

First, it is obvious that internal audit failed miserably in this instance in its ability to distinguish serious corruption and graft from run-of-the-mill administrative wrongdoing. While these failures could simply be explained by errors of judgment or questions of competence, it is also likely that they were influenced by the various manifestations and consequences of political interference. It is also possible that, in favouring Mr. Guité's version of events, the auditors and managers involved were responding to a core value of the public service that holds the defence of national unity to be the ultimate objective and a justification for some breaking of the rules. Somewhat more likely, but less noble, is that they simply recognized the extraordinary political nature of Mr. Guité's operations and stepped back out of deference.

There is also the possibility that the auditors were directed, implicitly or explicitly, to "step back" by senior management at the instruction of the Minister or the Prime Minister's Office. If so, this would represent an inappropriate incursion of the political and possibly the executive levels into the administration of a department and should not have been tolerated by the Deputy Minister.

Leaving aside the direct example of the Sponsorship Program, there are some important cultural aspects of internal audit which can, to varying degrees, impact on its reliability. These include the classification and status of auditors within the bureaucracy, the perception of that status by the public servants they audit, their relationship with program managers, and the motivation and character of the people themselves who take up that role.

There are also questions about the methodologies used by audits—the rigour and accuracy of risk assessments, the appropriateness of the techniques used, the standards applied. What has been identified as "audit rhetoric" and the tendency for "mandate creep" can result in a pushback by managers that takes the form of negotiated findings. Perceived philosophical or personal bias on the part of auditors can on occasion result in a situation where the audit findings are no longer perceived by management as an objective or clinical accounting of facts.

Access to information legislation has significantly affected the internal audit function. What was intended to be internal and confidential is now a very public exercise that has forced Deputy Ministers to micromanage in a fishbowl environment. It has attributed to internal audit a status that carries with it potentially national political implications. The gap between what the public expects of audits—that is to say, an assessment of financial regularity—and what many audits actually deliver—a wide range of compliance and performance assessments—has been exploited by both the media and Opposition parties to elevate reported administrative wrongdoing into financial and political scandal. The result is that internal audit reports are now carefully crafted to remove any information that might prove embarrassing to the department, Minister or Government. This has to some degree "politicized" internal audit reporting and imposed an inappropriate duty on public servants to emasculate and sanitize findings, to the detriment of accurate internal reporting.

3 The Government's Response: Proposed Reforms to Internal Audit

On October 21, 2005, Treasury Board President, the Honourable Reg Alcock, introduced a comprehensive list of reforms to the public service designed to improve accountability and financial management within the Government of Canada. The focus of these reforms was aimed at "fixing" what the Government perceived as systemic failures in the mechanisms of oversight and accountability within government departments. These failures had allowed the irregularities of the Sponsorship and Advertising Programs to flourish undetected and, if unaddressed, could lead to similar episodes of malfeasance elsewhere within Government.

The main structural development in the Government's new policy portfolio is the re-establishment of the Office of the Comptroller General within Treasury Board Secretariat. Many of the principal tenets of the proposed policy on internal audit are therefore designed to accommodate this reconfigured model of central agency control, as well as to address the systemic weaknesses that are perceived to exist in the system as it now exists. The main elements of the new policy[71] are summarized as follows:

- The Deputy Minister is responsible for the establishment of an internal audit function that is appropriately resourced and operates in accordance with professional internal audit standards;
- The position of Chief Audit Executive will be established at a senior executive level to lead and direct the internal audit function within departments; this individual will be appointed by the Deputy Minister but is mandated, after discussion with the Deputy, to inform the Comptroller General, without delay, of any risk, control or management practice that may be of significance to Government and/or require Treasury Board's involvement;

- The departmental audit committees will be reconfigured to include a majority of external members from outside the public service, with the remainder coming from outside of the department; the Comptroller General will determine the competency profile for these external members, and appointments will be made jointly with the Deputy Minister; the Deputy Minister may serve as chair or *ex officio* on the committee;
- The audit committee is to meet annually, *in camera*, with the Minister to provide assurances regarding risk management, control, and audit systems;
- The Office of the Comptroller General will conduct horizontal audits in areas considered to be of high risk, in particular, areas such as contracting and human resources;
- Beginning in 2006, the Office of the Comptroller General will conduct focused internal audits of more than 40 small departments and agencies (SDAs);
- Consulting and Audit Canada has been disbanded and the two services separated; the consulting service will be amalgamated with PWGSC while the best use of the audit services is to be determined by PWGSC and the Comptroller General's Office;
- Deputy Ministers will be responsible for the following: the independence, professionalism, timeliness and performance of the internal audit function as well as its success in addressing high risk areas; the performance of the audit committees; support to the Comptroller General in carrying out horizontal or direct audits; approval of the annual audit plan; and the effectiveness of any follow-up action plans that might arise out of the audit process;
- The consequence to Deputy Ministers or other public servants for lack of compliance with the new internal audit policy will be sanctions as set out in the *Financial Administration Act*.

There is no question that some direct and concerted remedial action by Government would be expected and in fact, required, in response to an incident of the magnitude of the sponsorship scandal. Audit failure did occur and, as such, is an appropriate target for reform. It is, however, important in analyzing the Government's response to recall that, as observations made earlier in this study indicate, these audit failures were primarily due to issues of political interference, obfuscation in audit information, accountability and competence.

It is also evident from the thrust of these measures that Treasury Board is attempting to bring the Government's audit regime into line with private sector practices and the standards currently prevalent in the international audit community. This presumes a culture and management structure in the public service that will readily accept and accommodate such direct transposition of this private sector model, as well as recognition by those affected that these measures are necessary, warranted and an improvement on existing practice.

3.1

Premises and Motivations

While a thorough analysis of the complex motivations and influences that underlie the Government's managerial reforms is well beyond the scope of this paper, it appears evident that the current administration is operating under several basic and, some would suggest, faulty premises.

The first assumption suggested by the range of these reforms is that the sponsorship and advertising irregularities were primarily attributable to a lack or failure of bureaucratic control and oversight and that, by extension, the imposition of more stringent, extensive and centrally-controlled surveillance mechanisms will prevent any future occurrence of this sort. While weaknesses in the audit and oversight system were exposed through this incident, the major conclusion arrived at by both the Auditor General and Justice Gomery, and supported by the findings of this study, was that sufficient and appropriate rules, policies and oversight mechanisms did exist, but that these safeguards were removed, abrogated or ignored as a direct result of political influence and interference. As Mr. Cutler himself explained:

> [T]he checks and balances that were in place were sufficient. What happened was they removed them — when they created Mr. Guité's unit, when I was moved to it — they removed all the checks and balances that had been in place and had been a very adequate set that had worked for years.[70]

That the public service cowered and retreated in the face of this political incursion into program administration is the critical issue ignored in the equation of these reforms. This culture of bureaucratic timidity is unlikely to be removed by the institution of a more oppressive and pervasive scheme of regulatory governance. In that sense, the efforts in this policy to reinforce the role of Ministers and central agencies as omnipotent forces within the machinery of government is wholly unlikely to encourage the greater resilience and fortitude in Deputy Ministers and bureaucrats necessary to push back or hold strong in the face of inappropriate political interference. Indeed, it may well succeed in having just the opposite effect.

Second, there is a strong indication that the Government perceives Ministers, and not their Deputies, as the primary managers of federal departments.[71] Such an assumption would represent a departure from the convention that is currently reflected in the machinery of government. Both the Glassco and Lambert Commissions, when examining this question, came to the conclusion that it should be, and in fact is, the Deputy Ministers, not their political masters, who are the key administrators of government business. Further support of that understanding is enshrined in the *Financial Administration Act*, which clearly indicates the areas of departmental administration for which deputy heads are legally responsible in their own right. That these statutory accountabilities exist and are legally entrenched must be consistently and responsibly supported by the machinery of government and endorsed in both spirit and practice through government policy on matters of departmental oversight, control and responsibility. While the sponsorship scandal revealed problems with the current definition and understanding of both ministerial and deputy ministerial accountability, in that neither one nor the other accepted blame for the outcome, the shift of reporting authorities and controls away from the Deputy Minister and towards Ministers, central agencies or external appointees, as suggested by some of the proposed reforms, might in practice serve to further discourage the clarity of accountability which this Inquiry so clearly has demonstrated to be currently lacking in Canadian governance.

Third, these proposals reinforce a growing and fundamental confusion between the intended roles of internal and external audit. Internal audit, as indicated previously in this paper, is meant as a management tool to provide Deputy Ministers, as chief administrators, with regular, ongoing and confidential intelligence on the workings of their departments. It is a system of containment in the best sense of the word, built on the premise that given appropriate indication of non-compliance or irregularity, Deputy Ministers will "do the right thing" and act in a timely and responsible way to redress any administrative weaknesses or malfeasance. Assurances to Ministers by Deputy Ministers are currently made on a regular and/or as needed basis without involving the political level in the minutiae of program administration. External audit, on the other hand, has a different objective and constituency. It is performed on a cyclical basis by auditors from outside the department, is externally scoped and driven, and responds to an assessment of risk as determined by central agencies outside the department, most notably the Auditor

General. External audits provide the greatest degree of objectivity and independence of any audit process, enabling reliable assurances of the regularity and probity of government operations for the benefit of both Parliament and the Canadian public.

The proposed reforms, with their increased involvement of central agencies, external membership on audit committees, and "horizontal" internal audits conducted under the auspices of Treasury Board, all appear designed to hybridize the internal audit function and have it provide assurances normally provided by external audit. The Government makes no apologies for the bastardization of this function given that this protocol reflects the best practices of the corporate sector, including Crown Corporations.

The veracity of these assumptions — that the bureaucracy suffers from a dearth of oversight, that Ministers, not their Deputies, are the principal managers of departments and that internal audit should provide external assurance — is further supported by Treasury Board's apparent return to its former philosophy of "command and control." This reversion represents a violent swing of the pendulum back from the "steer, not row" and "let managers manage" approach that has prevailed for the past decade and that was intended to make government more flexible, efficient and responsive in its delivery of programs and services to Canadians. The reintroduction of the previously failed institution of the Office of the Comptroller General and the creation of a cadre of operatives in the form of Chief Audit Executives who will be appointed by Deputy Ministers but answerable to Treasury Board, could further muddy the waters of direct accountability. Split loyalty never being recognized as an attribute in any departmental employee, those familiar with the vagaries of dual reporting authority argue that Deputy Ministers will no longer be assured that their main executives are now in fact on the same page as the department. A cry of "let the games begin" might be heard resounding throughout government in anticipation of the intrigues and folly that will arise as a result of the attempts by these chief auditors to dance simultaneously to the beats of two different drummers.

3.2

Reconstitution of the Audit Committees

The restructuring of the Audit Review Committee is perhaps the most significant change being proposed to the current audit regime. One aspect of its intent, as previously mentioned, is to bring government practices more in line with those of the private sector. There is, however, another motivation. Some believe there is pervasive evidence that Deputy Ministers currently fail to fully understand or appropriately manage the function of internal audit. It is felt that they are obsessed with the suppression of bad news to the detriment of effective audit assessment, that they can be obstructionist with regard to the target of audits and that they lack the independence, objectivity and necessary expertise to serve on audit committees or provide reliable assurances to their Ministers. The general lack of professional accreditation currently found among the heads of audit appointed by the Deputy Ministers is seen as evidence of their failure to appreciate the importance of the function and their desire to diminish its effectiveness within their departments. The capacity of Deputy Ministers with regard to internal audit likely spans a continuum across government, but given even a bell curve breakdown of this assessment, it might seem to some folly for government to leave the responsibility for audit review and oversight in the hands of these managers.

At present, that is largely the case. Audit review committees, with few exceptions, are composed of senior managers and chaired by the Deputy Minister. Their mandate is to review, discuss and accept the final audit reports and action plans that are the outcome of the internal audit function. Deputy Ministers hold sole authority in the appointment of their heads of audit. As a management tool designed for the use and benefit of these senior administrators, it could be argued that the reporting structure as it now exists is logical, if slightly incestuous. Perhaps in response to this lack of objectivity, in recent years some Deputy Ministers have reached beyond the upper floors of their own departments and invited one or two external members to join their review committee. There are unquestionably advantages to be gained from the contributions of these outside members in that they bring fresh eyes, diverse expertise and an objective perspective to the review of departmental findings. Their participation represents "value added" to the committee and can ensure a more independent and robust review of audit findings. Several Deputy Ministers who have implemented this structure are pleased with the benefits of this outside perspective.[74]

In proposing its reform of the audit committee process, Treasury Board has gone well beyond the motivation and efforts initiated by the Deputy Ministers in this direction and recommended that the audit committees be made up exclusively of external members. The policy describes as the intent of this move an effort to make the committee "much more independent from the management of the organizations they review."[75] To that end, Treasury Board asserts that, "When the new policy is fully implemented, all audit committees will have a majority of members coming from outside the public service, with the remainder coming from other departments."[76] The policy statement goes on to indicate that the Deputy Minister may chair the Committee or be an *ex officio* member, but provides no requirement for any members of senior management to be present. Further, Treasury Board will establish "competency profiles"[77] for these external members and select them "jointly with the deputy minister."[78]

Proponents of this external membership approach argue that rather than removing the committee from the Deputy Minister's purview, this new structure will ensure that the audit review is handled by individuals with more appropriate expertise and who are better able, by virtue of their objectivity and independence, to ask the tough questions of the auditors and ferret out the truth behind obfuscated reporting. It is thought this restructuring of the committee will liberate the Deputy Minister and senior managers from a task that can be better handled by those with more targeted expertise in audit matters and yet still provide them with the necessary information and assurances they require regarding the operations of their department.

At the same time, should the external members detect ineptitude in the management of the Deputy Minister or identify an instance of wrongdoing that might have significant or government-wide implications, the Government feels these outside members will be well placed to advise Treasury Board or the Minister of their concerns. As such, those in favour of this structure suggest that this will provide government with greater confidence in the integrity of the audit system governing departmental regularity. The imposition of external agents between the Deputy Minister and central agencies or Ministers is felt by some mandarins to offend the conventions governing those relationships. The private sector has adapted over time; Treasury Board sees no reason why government cannot reap the extra benefits of this hybrid internal/external audit system and is confident that the Deputy Ministers will understand and get in line with Treasury Board's way of thought.

Can the mechanics of government oversight be shoehorned into this private sector model? Critics argue that the unique nature of government and the culture in which it operates will make it a difficult fit. Some practical issues arise. Given the number of government departments, upwards of 300 audit committee "experts" will need to be identified and hired. Some suggest that it will be extremely difficult to find competent, willing and available individuals from outside the public sector who will not in some way be in conflict when sitting on the audit committees of Departments such as Industry, PWGSC or Finance. Further, there is the issue of patronage. It would stand to reason that the Government will want to recruit individuals to these positions who would be sympathetic to the party in power. However, in so doing, these committees run the risk of becoming politicized. External audit membership could well wander down the path of so many other public appointments and become just one more trough at which the party faithful feed.

The proposed reform policy dictates that the audit committee meet annually with the Minister *in camera* without the Deputy Minister present.[illegible] Again, this reflects the current practice in many private sector corporations that is designed to give corporate boards an independent assurance that their chief executives are complying with policies and regulations and adhering to appropriate financial management practices. In government, this would represent a sea change in the tenor of the relationship that has existed between Deputy Ministers and Ministers. Traditionally, it has been the Office of the Auditor General and, to some degree, Treasury Board that have served as watchdogs and provided Ministers with external audit assurances.

While having private citizens provide assurances to Ministers on the performance of government departments is indeed a departure from common practice, it is the inclusion of public service members from another department on these external audit committees that may prove to be the most delicate part of this innovation. No doubt this requirement was included as insurance that at least one person on the audit committee would understand the operations of government. However, it does raise the very odd spectre of a Deputy Minister from one department providing assurances to a Minister other than his own. The "snitch" factor that is the subtext of the prescribed annual audit committee meeting with the Minister makes the participation of these departmental officials a potentially demeaning experience for both Deputy Ministers involved, and at a personal level could lead to no end of resentments, ill will and conflict within the Deputy Minister community.

There is also the issue of accountability. It is evident that one of the aims of this policy is to reinforce the concept of "Minister as manager" and clarify his or her responsibility and accountability for the proper administration of his or her department. There is also a presumption evident through this change in the role of the Deputy Minister with regard to the audit committee that the current system has failed to provide Ministers with appropriate assurances. The question must be asked, however, that if the failure of the Deputy Minister to recognize the seriousness of the sponsorship irregularities (and therefore his failure to inform his Minister or Treasury Board of these issues) lay with the quality of the information he was receiving, what guarantee is there that a committee comprised of external members, given the same information, might not likewise come to a similar conclusion? And if important information such as this is missed, or as in the case with the Sponsorship Program, assurances are given which in the end prove to be false, what liability or accountability will these external members bear as the ones responsible to assess and provide that information? Both the Deputy Minister and the Minister can blame this external body for not having properly informed them, and if past practice is any indication, they can use this failure to refuse any responsibility. Thus, the lines of "blameability" and "accountability" are further muddied, but in this case those "responsible" are now either outside the department or outside the Government. The assumption is, of course, that the external committees, with their more astute perceptions, objectivity and audit expertise, would never let this happen. However, if it does happen, would this committee not provide yet another ready scapegoat?

3.3

Will More be Better?

The re-establishment of the Office of the Comptroller General signals an era of greater central agency involvement in the oversight of government departments and, inevitably, an increase in the number of audits required. According to the new internal audit policy, the spectre of "horizontal audits" will now complement the ongoing roster of 20 to 30 cyclical internal audits currently being conducted in departments such as PWGSC. Add to that the financial and performance audits currently being undertaken by the Auditor General, and one can rightfully conclude that this administration is among the chief proponents of an "audit society."

Based on the dubious audit history of the Sponsorship Program, there is no question that a certain degree of improvement in the quality of internal audit, its professionalism, the competence of its personnel, the integrity of its reporting, and the capacity of audit committees to properly decode the messages being sent are all required. Presumably, the extra resources, expertise, guidelines and structure that will emanate from the Comptroller General's Office will assist in closing the gap between the ideal of what an internal audit should be and accomplish, and the sometimes less-than-optimal results that are now being realized. To that extent, any of the initiatives designed to support an improvement in the quality of internal audit should be enthusiastically embraced and universally welcomed.

At the same time, it must be acknowledged that audits are stressful, and that they demand time, energy and resources from departments and individuals already labouring hard to accomplish the real work of public administration—that being the achievement of the objectives of the elected government by means of the prudent stewardship of public resources. Given the frailties of human nature and, on occasion, the outright corruption of individuals, it is understood that there must be some time and effort dedicated to accounting. However, when the balance of "doers" to "checkers" gets too strongly tilted in favour of the latter, the oversight becomes oppressive and the corresponding impact on the morale and self-esteem of public servants can be significant. It is in no government's best interest to create so much tension among its employees—between the pressure on them to perform and the pressure on them to account for that performance—that they lose all latitude for creativity, innovation or common sense. The more you look, the more you will find. In imposing the additional horizontal audits on managers as prescribed by this new policy, the Office of the Comptroller General walks a fine line between uncovering significant irregularities or corruption and inadvertently undermining the morale and self-confidence of employees as a result of too much time spent under the microscope.

3.4

Some Final Thoughts on the Proposed Reforms

Assessed against the issues that this study has identified as being central to the failure of the audit process in the Sponsorship Program, it seems apparent that the reforms fail to address one of the most salient issues that led to that failure, that being the impact of access to information on the quality of audit reporting. Remove the pressure on Deputy Ministers to operate in the fishbowl environment created by access to information legislation and, therefore, the need to protect their departments and Ministers from the possible backlash stemming from public access to negative audit reports, and the major incentive to obfuscate and water down reports disappears. Significant redress to one of the main institutional impediments to auditing could be made by amending the *Access to Information Act* to remove all working papers and, ideally, reports, of internal audit from the reach of the Act. The desire for openness and transparency should not be allowed to corrupt the integrity of the audit process itself, and could well be satisfied by the publication of summaries of reports.

Second, these reforms fail to address the very critical issue of the classification of auditors within departments. The observations of this study indicate that in general it is quality and professionalism that is currently most lacking in auditors. Appointing accredited heads of audit as recommended by this policy will be a step in the right direction, but the benefit of this improvement might well be lost if the calibre of individuals reporting to the head remains at a clerical level—that is, if the Government has not gone far enough in its efforts to professionalize this function.

Third, it is far from certain that the subtext of distrust of bureaucracy that is reflected in the thrust of this new policy will create the type of robust, self-confident public service required to stand up to the pressure of political interference in the future. The emphasis on enhancing the power and reach of central agencies, the lack of respect for Deputy Ministers as chief administrators of their departments, and the emphasis on the pre-eminence of Ministers are all signals to public servants that direction should be taken from above, and will do little to alter the culture of deference to the political and executive levels that we witnessed during this sponsorship scandal. Nor is it likely to prevent a similar reaction the next time the political level exerts its reach below stairs. In tarring the many for the transgressions of a few, in failing to establish strong and effective legislation to protect whistleblowers or to heavily sanction those public servants who were guilty of stepping back, the Government and Parliament have failed to create the appropriate environment to encourage public servants to ask the tough questions.

The sponsorship scandal was the result of the wrongdoing of a small group of isolated individuals working off-grid in a clandestine operation directed by the Prime Minister's Office. It was not reflective of regular government activity, ethics or operations. Yet like a class kept in for recess for the misbehaviour of a few, the public service is feeling unfairly blamed and censored for actions that were fundamentally beyond its control. Worse still, it appears from this perspective that it is those most directly culpable who are now pointing fingers, and it is the fundamental injustice of this situation that will likely taint the acceptance of even the most reasonable and necessary attempts to improve the function of internal audit. As former Deputy Minister Arthur Kroeger points out:

> What you've got at the moment is a reaction to the activities of 14 officials who were segregated [as an excuse] to impose widespread additional management requirements on 200,000 public servants across the country.[80]

Others interviewed argue that the result of the Government's heavy-handed response to this idiosyncratic occurrence that was, fundamentally, not of the bureaucracy's making will succeed in nothing more than mummifying the public service in red tape, imposing extraordinary inefficiencies as these new systems are learned, implemented and accommodated within an already overburdened bureaucracy, and building a level of bitterness and resentment that will further poison the already demoralized atmosphere of today's public service. Proponents are equally convinced that this model will set the public service on the path of greater professionalism and accountability and that, properly implemented, this model will allow the Government to sleep nights knowing that another sponsorship scandal will never again be allowed to flourish undetected. Time, no doubt, will be the final arbiter in that debate, but the question of what role internal audit played in the overall drama of the sponsorship scandal returns us, finally, to the central plot of this paper.

4 The Nail in the Shoe—Conclusions

Was a lack of attention and rigour in internal audit the "nail" that might one day lead to the loss of the Government in power, if not the "kingdom" itself, through a future referendum? In the light of pure audit theory, the answer to that question would be "Yes." A thorough investigation by internal audit of the risks posed by the early evidence of financial irregularity in advertising contracts might well have arrested the sponsorship scandal in its tracks. Those responsible, if not detected, might well have been frightened off by the spectre of rigorous and ongoing scrutiny, and the nefarious arrangements that escalated over time might never have occurred. The return of the procurement function of APORS to the mainstream of PWGSC would have restored the institutional checks and balances that first led Mr. Cutler and his superiors to question Mr. Guité's actions back in 1994, and would have triggered concerns through a different line of reporting authority had these irregularities continued. The system would have worked.

But would it have worked? The answer to this question is likely "No." Internal audit, in the face of concerted and ongoing political interference in the regular systems of public administration, was only one of the many institutional smoke alarms that failed to sound in the face of so much political fire. As the principal warning system for the detection of wrongdoing, it perhaps holds a greater responsibility than most for having failed in this capacity, but it was not immune to the larger pressures that were being brought to bear at PWGSC with regard to the workings of this clandestine operation under Mr. Guité's authority.

This of course speaks to the objectivity of internal audit within the departmental system. Would a Chief Audit Executive, with perhaps greater loyalties to Treasury Board than the Department, have been immune from this level of political interference? The answer is likely "No." In the face of prime ministerial priority and the potential breakup of the country, even the central agencies might well have assumed a crouch and done their master's bidding. It was not that the irregularities of this program were unknown. A former Deputy Minister stated that by the late 1990s the Deputy Minister community knew that there was something not quite right happening within the sanctum of PWGSC.[51] It was ultimately the responsibility of the Deputy Minister to recognize the impropriety of what was occurring, to object and, if his protests fell on deaf ears, to resign. He took no such action. At the time, he saw no such need.

In the context of these loftier accountabilities, internal audit was but a bit player. That this function could have played a role in arming the Deputy Minister with the facts and evidence regarding the depth of corruption, and that it failed in that critical duty, is not to be dismissed. Information is power and, as such, the information disclosed through internal audit plays a significant role in the political system. As this saga surely demonstrates, even small, seemingly insignificant manipulations of information can have profound and pervasive implications. Like the story of how the death of one monarch butterfly in Mexico can change the course of world events, so too can the smallest detail of an internal audit unleash cataclysmic national and political repercussions. It is the lesson taught to our youth in the nursery: the important consequences of seemingly insignificant actions. But for the want of a nail....

Endnotes

[1] Treasury Board of Canada Secretariat, *Policy on Internal Audit*, October 21, 2005.

[2] Commission of Inquiry into the Sponsorship Program & Advertising Activities, *Who is Responsible? Fact Finding Report*, November 1, 2005, Chapter VII, "Audits and Investigations," pp. 197–219.

[3] Office of the Auditor General, *Report of the Auditor General to the House of Commons*, November 2003, Overall Main Points, p. 1.

[4] Testimony of Norman Steinberg to the Commission of Inquiry into the Sponsorship Program and Advertising Activities, October 4, 2004, Volume 16, p. 2493 (OF).

[5] The audit branch of PWGSC was named the "Audit and Evaluation Branch (AEB)" up until 1996, the Audit and Review Branch (ARB) between 1996 and 2002 and the Audit and Ethics Branch (AEB) after 2002. To avoid confusion, the term "Audit and Review Branch (ARB)" has been used throughout this paper.

[6] Testimony of Norman Steinberg to the Commission of Inquiry into the Sponsorship Program and Advertising Activities, October 4, 2004, Volume 16, pp. 2492–2493.

[7] Testimony of Allan Cutler to the House of Commons Standing Committee on Public Accounts, March 11, 2003, 9:1020.

[8] Notes of Julie Ginley quoted by Mr. Finkelstein before the Commission of Inquiry into the Sponsorship Program and Advertising Activities, October 4, 2004, Volume 16, p. 2501 (OF).

[9] Ibid., p. 2499.

[10] Testimony of Norman Steinberg to the Commission of Inquiry into the Sponsorship Program and Advertising Activities, October 4, 2004, Volume 16, p. 2494 (OF).

[11] Ibid., p. 2497.

[12] Ibid.

[13] Testimony of Allan Cutler to the House of Commons Standing Committee on Public Accounts, March 11, 2003, 9:1020.

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[16] Testimony of Allan Cutler to the Commission of Inquiry into the Sponsorship Program and Advertising Activities, September, 28, 2004, Volume 13, p. 2134 (OF).

[17] Ibid., p. 2135 (OF).

[18] Brian O'Neal, p. 8.

[19] Testimony of Norman Steinberg to the Commission of Inquiry into the Sponsorship Program and Advertising Activities, October 4, 2004, Volume 16, p. 2485 (OF).

[20] Ibid.

[21] Public Works and Government Services Canada, Memorandum to Mr. Jim Stobbe from Norman Steinberg, Head of Audit and Review Branch, PWGSC, File no. 1530-96-056-11/5, 19 June, 1996.

[62] Ibid.

[63] First draft of Ernst & Young audit report quoted by Mr. Finkelstein before the Commission of Inquiry into the Sponsorship Program and Advertising Activities, September 29, 2005, Volume 14, p. 2261 (OE).

[64] Ibid., p. 2250.

[65] Ibid., pp. 2252-53.

[66] Final Report of the Ernst & Young audit, quoted by Mr. Finkelstein, ibid., p. 2269.

[67] Ibid., p. 2281.

[68] Testimony of Ranald Quail to the Commission of Inquiry into the Sponsorship Program and Advertising Activities, November 24, 2004, Volume 39, p. 6773 (OE).

[69] Ibid., p. 6771.

[70] Testimony of Norman Steinberg to the Commission of Inquiry into the Sponsorship Program and Advertising Activities, October 4, 2004, Volume 16, pp. 2557-2558 (OE).

[71] Justice Gomery in ibid., pp. 2619-2620.

[72] Testimony of Norman Steinberg in ibid., p. 2621.

[73] Ibid., p. 2620.

[74] Brian O'Neal, p. 11.

[75] Treasury Board document #824628, November 21, 1996, in Brian O'Neal, p. 12.

[76] Brian O'Neal, p. 22.

[77] Ibid., p. 22.

[78] Ibid., p. 23.

[79] Ibid.

[80] Conversation with Denis Desautels, Ottawa, October 20, 2005.

[81] Testimony of Alfonso Gagliano to the Commission of Inquiry into the Sponsorship Program and Advertising Activities, February 3, 2005, Volume 69, p. 11969 (E).

[82] Brian O'Neal, p. 33.

[83] For a complete discussion of this theory, please see Denis Saint-Martin, "L'Affaire Groupaction: un cas de politisation de la Fonction publique fédérale?" Canadian Public Administration, Volume 46, No. 4, pp. 450-470.

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[88] Testimony of Ranald Quail to the Commission of Inquiry into the Sponsorship Program and Advertising Activities, November 25, 2004, Volume 40, pp. 6883-6884 (OE).

[89] Testimony of Brian MacAdam to the House of Commons Standing Committee on Public Accounts, February 3, 2005.

[90] Conversation with Senior Assistant Deputy Minister, November 12, 2005, Ottawa.

[91] Ibid.

[92] David Good, p. 52.

[53] Ibid., p. 193.

[54] Ibid., p. 192.

[55] Conversation with an Assistant Deputy Minister, November 12, 2005, Ottawa.

[56] Testimony of Brian MacAdam, House of Commons Standing Committee on Public Accounts, February 3, 2005.

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[66] David Good, p. 64.

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[68] Ibid., p. 69.

[69] Ibid., p. 211.

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[73] Reg Alcock, President of the Treasury Board, Standing Senate Committee on National Finance. Evidence, 16 November 2005.

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FEDERAL GOVERNMENT ADVERTISING AND SPONSORSHIPS: NEW DIRECTIONS IN MANAGEMENT AND OVERSIGHT

Ian R. Sadinsky and Thomas K. Gussman

1 Introduction

Since Confederation, Canada has witnessed what could be characterized as an unholy alliance between advertising agencies and political parties.[1] As governments, parties and public issues have changed, the general terms of this alliance have remained essentially the same — "work for our party for free or at a substantially reduced cost during an election campaign, and you will be rewarded with contracts should we be elected." Although Canadians have in general always required a high level of ethics and morality in public administration, this is one of the few anomalies that remains stuck at a "wink, wink, nudge, nudge" level of conduct.

What changes have taken place that such a practice should be and could be removed permanently from the political landscape?

First, a more educated and informed electorate understands that such unholy alliances violate the public trust and place individual interests ahead of the public interest. That is not acceptable in today's Canada.

Second, there is a concerted effort to elevate standards of accountability and transparency in both public and private institutions. Recent well-publicized scandals of gross misconduct by private and public sector managers have increased the public's desire for greater legal and administrative controls as well as sanctions on those violating the public trust.

Third, election financing reforms have made it easier for parties to pay the costs of running a national campaign, virtually eliminated *pro bono* work during a campaign, and increased disclosure requirements. Recent amendments to the *Canada Elections Act* which came into force in January 2004 have reduced the maximum contribution allowed by Canadian citizens and permanent residents to a registered political party, district or candidate. Indirect contributions to registered political parties were sharply reduced for corporations and trade unions, as was the maximum contribution allowable to a particular candidate who is not part of a registered party.

Fourth, technical advances have expanded the options for communicating with the public, and there are many more competent firms capable of providing quick and economical advertising campaigns during the short time frame of an election.

Fifth, the "sponsorship scandal," which is the subject of the Commission of Inquiry into the Sponsorship Program and Advertising Activities, exposed many of the real costs of linking sponsorship and advertising contracts to party affiliation, including the waste of public money, the contamination of political and bureaucratic institutions, and the undermining of democratic and administrative processes.

The purpose of this paper is to examine weaknesses identified in the management of the government's advertising and sponsorship activities (as outlined in the Commission of Inquiry's *Fact Finding Report*) and the series of measures introduced by the Government of Canada since May 2002 to address them. We will assess whether the new initiatives are suitable and sufficient, or if additional actions are required.

2 Evolution of Federal Government Communication Policy and Procedures

2.1

Overall Objectives of the Government's Communication Policy

An examination of the federal government's policies and processes for the management of communications, including advertising and sponsorships, identifies a number of overriding objectives that should be pursued:

- Effectiveness (of the program)
- Value for money
- Transparency (of the process)
- Accountability (of political officials, public servants and service providers)
- Fairness (of the procurement process)
- Stewardship or Oversight
- Flexibility
- Capacity (skills and training)

One could argue that the so-called "sponsorship scandal" (which also included advertising activities) exposed weaknesses in all of these areas, some to a greater degree than others. There was also an apparent lack of independence from political involvement in specific management activities. We attempt to address each of these issues in our analysis.

2.2

Actions Following the Tabling of the Auditor General's Report

Following the tabling of the Auditor General's November 2003 report in February 2004, the Government of Canada reacted in various ways. One of these was to call for the Commission of Inquiry. Another action was to reduce the overall quantity of government advertising, including a moratorium announced on March 15, 2004, with a planned reduction of 15% in the government's media placement spending over three years. We will not attempt to determine what the proper level of government advertising should be or what specific programs should be the object of government advertising activities or sponsorship programs. This is essentially a policy or political decision, where choices may depend on the priorities of the government. We will have something to say on what constitutes "advertising" or "sponsorship," but we will not make an *a priori* assessment on whether individual initiatives are valid, appropriate or effective. In general, there is acceptance that non-partisan initiatives by government in advertising and sponsorships are legitimate as long as they follow comprehensive, transparent and fair policies and practices including oversight.

In the past three years, the Government of Canada has introduced comprehensive changes to the policies, procedures and organizations dealing with advertising, including:[7]

- Increasing the number of suppliers for advertising, the number of opportunities for firms to compete, and the variety of procurement methods;

- Payments based on hourly remuneration, as opposed to the former commission-based remuneration. Other methods of payment, such as retainers and performance-based methods, can be considered when warranted;
- Selection of a new Agency of Record through a competitive Request for Proposals (RFP) process;
- Establishment of a Canadian content requirement of 80 percent;
- Ongoing strengthening of internal capacity; and,
- Issuing an annual report on government advertising activities to increase transparency.

Noteworthy among these process changes is the elimination of commissions and a requirement for fees based upon approved hourly rates for the work in question—a key source of concern to the Commission of Inquiry.

These new procedures were accompanied by a number of structural and administrative changes. Among those, key changes included:

- On August 7, 2002, the elimination of Appendix Q of the Treasury Board regulations related to advertising, and the integration of advertising into mainstream Contracting Policy (this came into effect January 1, 2003);
- Strengthened management oversight through:
    - Centralizing government priority-setting for all advertising in PCO's Strategic Communications Planning section; and,
    - The creation of two new responsibility centers within Public Works and Government Services Canada (PWGSC) to manage and coordinate advertising initiatives—the Public Opinion Research and Advertising Coordination Directorate and the Communication Procurement Directorate.

2.3

Defining "Advertising"

Section 16.13.5 of the Government of Canada Contracting Policy (advertising) defines advertising as:

- all activities involved in the purchase, by or on behalf of the government, for the development and production of advertising campaigns and associated space or time in print or broadcast media, or in other mass media such as outdoors and transit advertising;

- any collateral materials such as posters, counter displays, and printed material such as inserts that are a direct extension of an advertising campaign, as well as Public Service Announcements;

- public relations, special events, direct marketing and promotional activities that are an extension or form part of an advertising campaign; and,

- paid announcements such as public notices regarding tenders, sales, public hearings, offers of employment, and business hours and addresses.

If greater rigour is to be introduced into the management of the government advertising function, then collateral functions and services must be separated from the definition of advertising. In the GOC Communications Policy, advertising is one of 17 subject areas under consideration for additional guidelines. At this time, Treasury Board has not yet produced a set of guidelines to govern planned advertising activities. One concern that has been raised is the fact that the definition of "advertising" has been expanded to such an extent that it now encompasses a wide range of activities, including sponsorships, promotional activities, marketing, special events management, and other communications services. This has opened up competitions to firms that may not have the technical expertise for traditional media campaigns. This expansion of the definition created some of the problems that came to light in the investigation of the "sponsorship scandal" by the Commission of Inquiry and by the Auditor General of Canada. We recommend that:

- *The current Government of Canada definition of "advertising" should immediately be tightened up to conform to accepted advertising industry standards and norms, and be promulgated as an amendment to the GOC Communications Policy and other related policies. This more restrictive definition should be in place before any new standing offer or supply arrangement competitions are held for the provision of advertising services.*

3 Advertising Oversight

Section 23 of the Communications Policy of the Government of Canada, along with the numerous new policies and structural changes at PWGSC for the management of advertising, has created an elaborate system of oversight for the advertising function.

The Privy Council Office (PCO), through the Government Advertising Committee (GAC), provides planning, oversight, and "challenge" functions for all government advertising initiatives. Although individual advertising initiatives under $75,000 can be approved by a PCO Policy Analyst, unusual or contentious programs will still be referred to the GAC. Cabinet must approve an overall annual budget for government-wide advertising expenditures and then each department must make a separate submission to Treasury Board for individual advertising initiatives.

At Public Works and Government Services Canada (PWGSC), advertising planning (the Advertising Coordination and Partnership Directorate) is separated from advertising procurement (the Communication Procurement Directorate). Each advertising initiative receives a work order (APV) which is tracked in a new management information system (ADMIS).

Deputy heads of individual departments are responsible for the overall management of communications and its integration with other key functions, including policy and programming. The deputy head is supported by a head of communications in each department.

To these oversight mechanisms will now be added:

- A Chief Financial Officer in each department, reporting to the deputy head but also functionally responsible to the Office of the Comptroller General; and,
- A Chief Audit Executive in each department who, with an Audit Committee (which includes a number of external government and non-government members), will establish a departmental Audit Plan.

PWGSC has also introduced a new position at the assistant deputy minister level, the Chief Risk Officer, who will ensure that proper management controls are in place. The incumbent is the former Assistant Auditor General who worked on the sponsorship file for the Office of the Auditor General.

With all of this oversight, the risk of reoccurrence of events that characterized the "sponsorship scandal" appears to be less likely, especially with continued scrutiny of government advertising activities by the media, Opposition parties and the public. This scrutiny is enhanced by new measures to increase transparency, including the posting on various government websites of approved allocations for advertising initiatives (TBS website), information on advertising-related contracts (Contracts Canada/PWGSC website), all work authorizations for media placement by the Agency of Record (AOR), all call-ups to agencies on the standing offer list, all contracts awarded through competition to firms on the pre-qualified supply arrangement list, and all contracts for larger campaigns competed through the full RFP process. In addition, each department and agency must post all contracts over $10,000 on their individual websites.

PWGSC also publishes an annual report on advertising activities that includes details on advertising contracts, expenditures by organizations, key results, and major advertising campaigns. It also contains information on advertising management initiatives.

Even with all of these initiatives, certain additional measures might be considered, because of the notoriety and public sensitivities about government advertising programs created by the "sponsorship scandal." We would recommend:

- *An instruction by the Office of the Comptroller General (OCG) to each department and agency to conduct annual audits of departmental advertising programs and processes for the foreseeable future, with an annual decision by the OCG on modifying or eliminating this requirement;*

- *Another comprehensive audit of government advertising initiatives by the Office of the Auditor General in fiscal year 2006-07 or fiscal year 2007-08 to verify that the new processes and policies in place are ensuring: fairness in the selection of suppliers; value for money; effective advertising campaigns; the development of functional and system capacity (including skills development and training); and the elimination of political intervention in the management and administration of advertising activities (but not in the establishment of government priorities or strategies); and,*

- *An independent assessment of the views of government departments and agencies, advertising firms and the public on the efficiency and effectiveness of the new advertising management systems and policies and any other impacts or unintended consequences.*

4 The Appropriate Locus of Oversight

Given the existing responsibilities and relationships between PCO and the Prime Minister's Office (PMO), there is a question of whether there is sufficient separation between politicians and public servants in the planning and administration of the advertising function. If the idea is to provide greater independence for the management of advertising activities, it may be better to move the function away from the PMO/PCO nexus.

To that end, we looked at some recent developments elsewhere in Canada on the management of government advertising. According to changes that came into force in Ontario on November 21, 2005, most advertising must now be reviewed by the provincial Auditor General (*Government Advertising Act, 2004*). Advertising must not be partisan; must not include the names, voices or images of members of the Executive Council or the Legislative Assembly (unless the primary audience is located outside of Ontario); and must fulfill at least one of the following purposes:

- Inform the public of policies or available programs and services;
- Inform the public of its legal rights and responsibilities;
- Encourage (or discourage) specific types of social behaviour;
- Promote Ontario as a good place to live, work, invest, study or visit;
- Promote an activity or sector of the Ontario economy.

The Auditor General of Ontario (AG) can establish an Advertising Commissioner to undertake this review of advertising items on his or her behalf. Any advertising items deemed not suitable cannot be used and the AG's decision is final. The AG also reports annually to the Speaker of the Legislative Assembly on any contraventions to the Act and on advertising expenditures (both for government advertising generally and for specific advertising items reviewable under the Act).

To assist with these tasks, the Ontario AG, through a public competition, has engaged a private sector lawyer who specializes in advertising as well as an academic to form an Advertising Working Group to approve ads. This would appear to add an additional level of independence that is not present in the current federal system.

Other models can be observed through the experiences of the provinces. Alberta, for example, has instituted a policy to increase competition whereby the creative process of ad development must be tendered to a different firm from the firm responsible for ad placement. Alberta's Public Affairs Bureau (PAB) handles all government communications activity. The PAB's Executive Director has assistants and communications officers assigned to provincial ministries that request communications assistance. Although the Executive Director reports to the Premier, PAB policies and procedures are seen as effective in insulating decisions on advertising from political influence. Among the "best practices" demonstrated in Alberta are the public availability of terms of reference, cross-ministry advisory panels, private sector involvement, and the distribution of work policies.

In looking for a centre for advertising management within the federal government, a number of potential options have been suggested. One favourite (especially among Canadians at large) is the Office of the Auditor General, which initially revealed the weaknesses in government advertising and sponsorship management. It can be argued that the Office of the federal Auditor General is not an appropriate location for such a function, since the AG does not provide *a priori* rulings or a challenge function to government.

While it is tempting to consider an independent advertising commission reporting to Parliament as offering a more workable mechanism, we are reluctant to recommend the creation of new organizations or officers of Parliament. The total value of government advertising is still relatively modest, and a stand-alone organization for this purpose could be seen as overkill.

Although the Office of the Comptroller General appears to have some merit as a possible locus for federal government advertising supervision, for the immediate future there are difficulties with such an option. The Comptroller General operates under the *aegis* of the Treasury Board Secretariat, which is a central agency. Thus, locating a supervisory function there might confuse accountabilities. As part of the Treasury Board Minister's recently announced reform package, the Comptroller General is presently responsible for implementing the concept of a Chief Financial Officer (CFO) within each federal department. This CFO would be independent from departmental operations and would have to be satisfied with the department's management control framework. There would be a dual reporting relationship both to the Deputy Minister within the departmental hierarchy and functionally to the Comptroller General. Each department's audit plan would be approved by an external audit committee. This is expected to enhance accountability and bring greater independence to the audit function. Once some experience has been gained in this new audit and financial control framework, the time may be more opportune to revisit the notion of an OCG supervisory role over advertising and sponsorship contracting.

In the longer run, PWGSC may prove to be the logical home for advertising management from a business perspective. It is a common service agency and that is where the GOC provides shared services. The size of PWGSC and its capacity to digest these services suggest, however, that this is not the appropriate time to attempt such a move. Capacity must be enhanced through various training initiatives, and, eventually, there may be a good case for relocating the overall management of the advertising function within that department.

In the short term, PCO appears to be an appropriate centre for priority-setting and planning, perhaps with a need for more technical expertise, backup, and possibly outside involvement from the private sector. Combined with the separation of roles among PWGSC, TBS and the OCG, this should provide assurance that oversight is sufficient and free from political interference.

5 Transparency and Independence

As noted, under the new Government of Canada Communications Policy, advertising planning is coordinated by the PCO. That office has overall strategic responsibility for federal government advertising. PCO is charged with developing and monitoring the Government Advertising Plan and recommending funding allocations under that Plan to Cabinet. The Government Advertising Committee (GAC) meets virtually every week to discuss longer-term and ongoing advertising requirements. Established in late 1999, the GAC is chaired by the Director of Strategic Communications Planning at PCO. Other permanent members of the GAC come from the Treasury Board Secretariat (TBS) and PWGSC's Public Opinion Research and Advertising Coordination area, and other seats rotate among departments. The GAC has no political representatives and reports through the Assistant Secretary, Communications (PCO) to the Operations Committee. Although it does not keep formal minutes, there are records of decisions made. Advertising is not considered to be a program, but rather an activity that is conducted in various departments and agencies. In fact, officials noted that even if there were no GAC, PCO and TBS would still be required to provide stewardship through their challenge function.

Under the new policies and procedures, advertising is a mainstream activity, and officials admit that it was not so before. Now, there are in place appropriate planning processes, procurement criteria, oversight mechanisms and audit plans. Decision-making is seen to be fully transparent and collective. Officials commented that the new system is the right system to ensure that events like the "sponsorship scandal" will never again take place.

With the checks and balances and complexities involved in seeking approval for an advertising campaign, finding a source of funds, obtaining Cabinet approval, preparing a Treasury Board submission for release of funds to individual campaigns, and conducting post-campaign audits and impact assessments, the system certainly appears to be airtight. Although it may still be too early to tell, the question could be asked whether enough air has been left inside the system to allow for creativity, innovation, and even expediency. Finding the balance between probity and effectiveness may require some modifications once the new processes and structures have had an opportunity to develop some sort of track record. Consideration should also be given to ensuring that a more formal and complete "paper trail" is available on advertising decisions.

6 The Advertising Procurement Process

One of the objectives of the Government of Canada's Advertising Management Renewal initiative was to introduce more fairness into the advertising procurement process. The "sponsorship scandal" had exposed a number of weaknesses or loopholes in the existing policies in addition to several questionable practices in the implementation and oversight of procurement.

The overall objective of the new measures introduced since 2002 has been to "normalize" advertising procurement to make it similar to other processes for GOC procurement of services. Other objectives have been to increase the fairness and transparency of the procurement system.

To increase overall competition, the requirement that advertising firms be 100% Canadian-owned has been changed to an 80% Canadian ownership requirement, opening the field of competition to more firms. Greater transparency and fairness have been introduced through the posting on various government websites of virtually all government advertising requirements, contract awards, call-ups, the development of appropriate selection criteria, and the reform of the composition of selection boards (including the use of external "fairness monitors"). One key change is the requirement that price be a selection factor in all procurements for bidders who have met the technical requirements of a competition.

Essentially, PWGSC has established a three-tier system for the selection of advertising agencies for creative planning and production and media placement strategies. The process for selecting the Agency of Record (AOR) that does the media placement has also been revamped, including the possibility of having more than one AOR. To underline how different and rigorous the new AOR requirements are, no agency qualified from the first amended AOR competition and it was necessary to run a new competition.

For the creative and media strategy requirements, the three procurement tiers are as follows:

Requirements up to $75,000—Standing Offers

For requirements up to $75,000, national and provincial standing offer lists are developed for firms that qualify through an open competition. Lists are in force for two years (currently May 21, 2004 to May 21, 2006). In total, 10 national and 11 provincial standing offers have been awarded. Nine firms qualified for both national and provincial standing offers, so in fact 12 different firms qualified in total. Subsequent selection for individual requirements is based on a formula, including the proportional distribution of work according to a firm's ranking in the actual competition to set up the standing offer.

Requirements between $75,000 and $750,000—Supply Arrangements

For larger requirements between $75,000 and $750,000, a pre-qualified supplier list is established by an open competition, again for two years, based on technical capabilities. But all pre-qualified firms can bid on all requirements, and decisions are made on both technical and financial proposals. Fourteen firms were selected in the first competition for this tier, including one firm that qualified for both national and provincial standing offers as well.

Requirements over $750,000—Open Competition

> For requirements over $750,000, competitions are held through the normal Request for Proposal process where requirements are posted on MERX, the government's electronic tendering system. Proposals are evaluated on both technical merit and price.

While the system appears to be working well from the government's perspective, the Canadian advertising industry has expressed concern about the use of standing offers. This is a complicated area. Arguments are made that using a limited number of standing offers in fact cuts off real competition for the duration of the period of these offers (i.e., two years). Such a system may not take into account changes in firms, their personnel, and developments in the marketplace (e.g., the rapidly growing use of the Internet as an acceptable mode of advertising). Smaller firms feel that the competitions may be biased towards larger firms and that they are often forced to align with larger firms or face the prospect of not receiving government work. Larger firms take a fee for their participation, reducing the actual professional time allotted to meeting the government's requirements.

This argument has also been put forward by other industries, such as the information technology and management consulting industries. In November 2005, PWGSC announced that, effective December 15, 2005, companies offering professional services such as consulting and human resources services would be able to register on a database to be considered for government contracts. In addition, the Government announced that it was willing to consider additional measures including:

- Recompeting some standing offers and supply arrangements;
- Providing support for joint ventures among small firms; and,
- Offering guidance to suppliers on how to meet exceptions in mandatory standing offers.

In a sense, the "normalization" of the advertising procurement process brings with it all of the demands on regular GOC procurement (e.g., regional balance, support to small business, "set aside" programs, stimulation of innovation, and job creation). It also requires attention to other "normal" procurement irregularities such as "contract splitting" and overly rigorous requirement definitions which may favour incumbent suppliers.

The balance between expediency and fairness in procurement is always a difficult one for government. If the actual volume of government advertising continues to decrease, government may want to examine other procurement strategies to ensure that there are sufficient suppliers in a healthy Canadian advertising industry and that innovation is encouraged. For example, some discretion could be allowed for new forms of advertising (such as Internet-based forms) by holding special competitions or possibly opening competitions for selected campaigns, even for low dollar value requirements.

The fairness of the procurement system will also be enhanced by increasing the number of PWGSC and other government employees with professional training and designations in advertising. The industry has suggested a joint study and program for pre-certification of advertising agencies. Any such programs would have to respect national and provincial jurisdictions for training and certification and also ensure that the initiative was not an attempt to create another form of "closed shop" (e.g., by discriminating against small or new agencies).

7 Assessing Results: Obtaining Value for Money

A major element of the government effort to ensure greater accountability was the re-establishment of the Office of the Comptroller General of Canada in December 2003 to oversee all government spending. The new Comptroller General has taken steps to have departmental comptrollers in place and to introduce professional certification standards. This is discussed elsewhere in our paper. The increased focus on regularized audits and the tracking of expenditures government-wide is noteworthy. The internal audit function within government has been, and continues to be, re-organized and strengthened to ensure comprehensive audit programs based on sound risk analysis.

Specific to the advertising area, various safeguards were introduced throughout the life cycle of advertising initiatives. One such safeguard involved a requirement to conduct post-campaign evaluations to assess the value received for money spent. This is consistent with the overall public sector trend toward results-based management, which requires that performance monitoring be in place and success measures be identified during the planning stages of an initiative. Federal departments and agencies are now required to conduct a post-campaign evaluation of all major advertising initiatives exceeding $400,000 in media buys. Such post-campaign research is an integral part of any advertising initiative and therefore must be included in the planning process. Project budgets must ensure that there will be sufficient resources to complete an evaluation. Such planning requires that appropriate indicators to measure success be identified prior to the campaign for use once the campaign has ended.

PWGSC and PCO work with other departments to research and evaluate the impact and value of their advertising initiatives. The "Advertising Campaign Evaluation Tool" consists of a series of standardized questions to be included at the beginning of a post-campaign survey and is used to evaluate major advertising campaigns. Departments and agencies are responsible for ensuring the quality of their evaluations. Data from post-campaign focus groups are publicly available through the Library of Parliament. Accountability to the public is further enhanced through annual PWGSC reports on government advertising and on public opinion research.[3] As well, significant findings from any evaluations must be noted in *Departmental Performance Reports* and departmental *Reports on Plans and Priorities*.

8 Building Professional Capacity in the Government Advertising Community

One of the relevant findings from the Commission of Inquiry was that many of the individuals managing and carrying out advertising contracts lacked professional credentials. Officials in the federal government responsible for the advertising function recognize this gap and have begun to seek solutions to narrow it. The Government has responded by developing a "community of practice" and introducing training requirements in specific areas for procurement officers.

8.1

Towards a Community of Practice

There is an emerging trend in the federal government for what are called "communities of practice." The federal procurement community has recently begun to move in this direction. This concept is also well-entrenched in the audit and evaluation communities, both of which are managed through a central agency (TBS).

The Communications Community Office (CCO) is one means of supporting these efforts for government communications specialists. The CCO is funded by Directors General of Communications across the government and one of its key objectives is learning and training. This effort is in its early stages and progress has been modest to date. Certain specific materials for advertising professionals, such as an Orientation Guide, appear to be out of date or at least difficult to access.[1]

Among CCO activities to support a community of practice are the gathering of lessons learned and the exploration of formal training for members of the community.

8.2

Training Programs

Training programs for federal government employees have received more emphasis recently and are expected to strengthen technical skills in different areas. The federal government has allocated $35 million to training initiatives at different levels. At the recruitment level, for example, the plan is to re-establish orientation training to impart organizational knowledge, values and ethics for new public servants. Another training stream will focus on management competencies, and there will be training, and possibly certification requirements, for certain communities of practice. For example, the Canada School of Public Service (CSPS) will be the central office for certification of financial officers.

Certification for procurement officers will be delivered at three levels, although such certification is not expected to be tied to conditions of employment. The concept will place emphasis on procurement process skills. Officials engaged in advertising management suggest that there may not be room to focus on commodity-specific skills, such as advertising management. On the other hand, other officials believe that it is possible to include an advertising component in procurement training or in communications management courses.

8.3

Perspectives on Certification

The difficult questions are whether and how to certify various professional groups. In recent years, the Government of Canada has been investing more heavily in this area. In 1998, the effort began with two communities, procurement and materiel management. The driver in both cases was a lack of confidence and trust. More recently, the Office of the Comptroller General has been developing a certification program for internal auditors. In this case, the impetus relates more to a desire to establish minimum professional standards.

Advertising is a sophisticated communications tool that requires specific skills from companies with proven track records. To ensure this level of competence is achieved, emphasis should be placed on the professional credentials of advertising suppliers and their employees. In addition, those persons in government responsible for the planning, procurement and administration of advertising campaigns also should have demonstrated competencies and skill sets. The Commission is not mandated to comment on provincial jurisdiction, which includes the supply of training and the licensing of professional groups. As such, the Commissioner can only encourage the advertising industry to establish professional norms and standards and to place greater emphasis on training programs. Within the public service, however, the Commission might wish to suggest that certain competencies and skill sets be required for officials engaged in advertising management or procurement.

8.4

The Professional Development and Certification Program

The Professional Development and Certification Program emerged as a key human resource renewal initiative in support of modern comptrollership, human resources modernization, and the new policy for continuous learning in the public service. It has two components, professional development and certification, and is designed to provide employees in the procurement, materiel management, and real property community with the learning tools to help acquire the skills, knowledge and expertise required to meet evolving and complex business needs, government priorities, and management initiatives. It is expected to enhance the professionalism and value-added contribution of this community in the delivery of programs and services to Canadians and in the organizations in which they are employed.[5]

The process for certifying internal auditors is expected to be less complex than others because that community already has standards and institutions. Advertising management is less precisely defined and, accordingly, has more grey areas in terms of what should be certified and how. A certification process can verify technical skills but does not necessarily prove that a candidate has the intellectual skills. Many critics of certification suggest that the focus ought to be on good training instead. Perhaps less complex solutions initially may better serve the interests of the advertising management community.

Among the conditions for putting any certification program in place are the need to establish a review body in addition to the certification body, and the need for a dispute resolution process. These issues must be weighed in the decision calculus before embarking on any such program.

If basic competencies and training requirements can be established and expressed in regulations, greater clarity can be brought to the question of "who is qualified?" In the "sponsorship scandal," it appears that the focus was more on getting things done as opposed to doing the right things to get things done, and this opened the door to abuse. If the people put in charge of managing advertising programs and the professionals chosen to carry out the work under contract must meet basic standards, the market will ultimately identify who is competent and who does not meet those standards.

Areas where the management of advertising-related work may be able to build upon lessons learned from the experience of the internal audit community, are quality assurance and continuous improvement.[6]

The federal audit function utilizes five quality assurance standards from the Institute of Internal Auditors (IIA). IIA Standard 1300 (Quality Assurance [QA] and Improvement Program) specifies that the chief audit executive must develop and maintain a quality assurance and improvement program that covers all aspects of the internal audit activity and continuously monitors its effectiveness. All aspects of the program should be designed to help the internal auditing activity add value and improve the organization's operations, and to provide assurance that the internal audit activity is in conformity with the standards and the Code of Ethics.

Other IIA QA standards relate to a process for monitoring the quality program (including ongoing performance reviews and self-assessment), and ensuring proper supervision so that objectives are achieved, quality is assured, and there is professional development of the staff.

The IIA has developed a specialty certification for public sector auditors, known as the Certified Government Auditing Professional (CGAP). The broad scope of this specialty emphasizes the internal auditor's role in strengthening accountability to the public and improving government services.[7]

In addition, the IIA offers a Certified Internal Auditor (CIA) designation. This is currently the only globally accepted certification for internal auditors and remains the standard by which individuals demonstrate their competency and professionalism in the internal auditing field.

The Office of the Comptroller General (OCG) is in the process of requiring such designations for the Senior Heads of Audit (and Evaluation) in federal departments within two years of their appointments.

The federal government should be encouraged to explore all means of endorsing professional standards and attempting to recruit or train individuals to meet those standards. In the end, certification will ensure competent management of advertising and sponsorship activities in the future.

9 Political Parties and Advertising Agencies

As the level of transparency and oversight of the advertising function in the federal government continues to expand, there should be increasingly few opportunities for advertising agencies and political parties to maintain the unholy alliance that has been characteristic of this function in the past.

It has been suggested by a number of observers that there should be a "cooling off" period for agencies working on political campaigns before they can bid on government contracts, so that agencies who may have worked for the party which forms the government would not immediately be rewarded for their efforts. The new election financing reforms essentially eliminate any *pro bono* work by agencies, and there is a deeper question of whether corporations who legitimately participate in the political process should be penalized and denied access to government business. Such an approach might actually have the opposite effect of encouraging covert participation or else discouraging all agencies from participation for fear of losing legitimate market opportunities.

By the same token, membership in a political party is the democratic right of all Canadians, and individuals should not be penalized for their party allegiances, just as they should not be unfairly rewarded.

The advertising industry itself may wish to explore a code of conduct for agencies dealing with political parties, so that there are clear guidelines as well as sanctions for companies who violate industry standards. One impact of the "sponsorship scandal" was that the advertising industry, especially in Quebec, felt unfairly tainted by rogue firms who had little or no connection to the mainstream of the industry. Every effort must be made to avoid this form of "guilt by association" in the future.

Politics can be a blood sport and the pursuit of power may lead individuals and organizations to test the ethical limits of society. Political parties, advertising agencies, and those tasked with overseeing our democratic institutions and processes, must be especially vigilant to ensure that basic standards of fairness are met. Individual Canadians must also speak out when they witness or suspect that these institutions and processes are being manipulated.

10 The New Approach to Sponsorships

In December 2003, Prime Minister Martin announced the cancellation of the Sponsorship Program and the dismantling of Communication Canada. Nevertheless, the new Government of Canada Communications Policy includes a small section on Sponsorships (section 25) and a larger section on Partnering and Collaborative Arrangements (section 24). The new policy makes individual departmental managers responsible for arranging or administering sponsorships, but they must consult with the head of communications in their department before issuing (or accepting) a sponsorship. In addition, the deputy head must be informed regularly of any communications plans or activities where a sponsorship arrangement is involved. Further, sponsorship activities will be subject to the same audit, evaluation and performance reporting processes that are required for other partnering or collaborative communications activities.

Since the "sponsorship scandal" became public, there appears to be reluctance on the part of the federal government to participate in sponsorship arrangements. Existing programs such as trade fairs, exhibitions and cultural initiatives continue to provide some visibility for the "Canada brand," but there is really no single focus at the current time for relatively small-scale sponsorship initiatives.

The current practice is to consider any new sponsorship initiative as part of the Government's "grants and contributions" programs. Sponsorships *per se* are a legitimate activity of both public and private sector organizations, and the disengagement of the federal government from this area has already been cited by many grassroots

social/cultural/agricultural/sports/heritage organizations as negatively affecting their events.

If the federal government intends to re-enter the area of sponsorships, it should do so armed with the following "lessons learned" from the events of 1994 to 2001. We recommend that:

- *Specific guidelines should be established for the objectives of sponsorship activities. (It is noted that Partnering, Collaborative Arrangements and Sponsorships is one of the 17 subject areas for which the Treasury Board Secretariat will be developing guidelines as annexes to the Communications Policy of the Government of Canada.)*

- *Like advertising activities, sponsorship activities should be conducted in a fair and transparent manner, free from political interference in the selection and management of individual sponsorship activities. (As with all government programs, Ministers should be free to set overall priorities and objectives within their departments.)*

- *Sponsorship activities (or variations thereof) should be clearly identified and described in all planning, management and reporting documents to departmental management, central agencies and to Parliament.*

- *Regular evaluations and audits should be undertaken of both a sample of individual sponsorship projects, as well as overall Government of Canada sponsorship activities, to ensure they are meeting stated objectives, providing value for money, not creating unintended consequences, and are free from partisanship in their management and administration.*

- *If a central focus for a formal sponsorship program is required, it should be in a program department, rather than in a central agency or a common service organization. Because of the number and variation of sponsorship events and activities, it is probably unnecessary to have a central planning and coordination mechanism similar to the Government Advertising Committee. Nevertheless, it might be useful to have an advisory group which could provide technical advice to departments that are contemplating or entering collaborative or sponsorship activities. This group could, for example, be* *associated with the Federal Identity Program office in the TBS or with the Advertising Coordination and Partnerships Sector in PWGSC.*

We would like to point out that the current Government of Canada Communications Policy does not apply to certain Crown Corporations and other public institutions listed in Schedule III to the *Financial Administration Act*. This includes entities such as Via Rail, Canada Post and the Royal Canadian Mint. While these organizations may have commercial and other reasons for seeking "branding" independence, there should, nonetheless, be some onus on them to assist in reinforcing the Government of Canada corporate image.

11 Conclusion

Overall, the Government of Canada has learned the lessons of the "sponsorship scandal," even before Justice John Gomery released his reports. If anything, the reaction has been to create what is tantamount to a "bunker mentality" to ensure that no abuses of the advertising system will occur again. By separating out the responsibilities for planning, procurement, agency selection, financing, and evaluation and audit, and strengthening many of the policies and procedures, additional checks and balances have been added to the system. There has also been a concerted effort to remove the involvement of ministers and political staff from the processes and operations, except for the establishment of strategic priorities, which is a legitimate role.

Some say that the pendulum may have swung too far and that some form of normalization is required. This would certainly seem to be the case with respect to sponsorships — where the "s-word" has now been almost totally eliminated from the government's jargon and mindset.

The events which constituted the "sponsorship scandal" have undoubtedly cast a long dark shadow, but they have also inaugurated a new era in the federal government's approach to advertising and sponsorships. That said, we cannot predict how long it will last. Caution, probity, fairness, transparency, and value for money have all become new watchwords in this once controversial area. The Auditor General of Canada pointed out that there were enough rules—some people just did not follow them, and others just looked away. Whether the new rules and procedures and the best intentions of politicians and public servants will once and for all end the unholy alliance between political parties and advertising agencies, will be a subject for auditors, political scientists, journalists, and historians to ponder in years to come.

Endnotes

Jonathan Rose, in quoting Jim Coutts, former principal secretary to Prime Minister Trudeau, captures the essence of the concept: "There are Liberal agencies and Tory agencies. That's the way advertising works in Canada." *Making "Pictures in Our Heads" Government Advertising in Canada*, Praeger Series in Political Communication, 2000, p. 89.

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